COURT, U. S. No. 73-1082 APR 30
MICHAEL RODAK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioners pray that a Writ of Certiorari issue to review judgments of the Appellate Court of Illinois, First District, entered on October 12, 1973.

OPINIONS BELOW

The judgments of the Appellate Court of Illinois, First District, affirming the dismissal of Petitioners' complaints, were entered on October 12, 1973. Thereafter, on January 30, 1974, the Supreme Court of Illinois, without opinion, denied petitions to appeal as a matter of right or, alternatively, for leave to appeal. The opinions of the Illinois Appellate Court are reported at 14 Ill. App. 3d 1035 and 1039 (1973).[1]

JURISDICTION

The judgments of the Appellate Court of Illinois, First District, were entered on October 12, 1973. On January 30, 1974, the Supreme Court of Illinois denied petitions to appeal as a matter of right or, alternatively, for leave to appeal.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1257(3).

QUESTIONS PRESENTED

Whether a state statute designed to permit judicial challenges to elections can constitutionally be construed in such a fashion as to deprive "defeated" candidates of an evidentiary hearing and of any opportunity to prove their allegations, simply because they are unable, within five days of the elections, to plead facts on the basis of personal knowledge conclusively demonstrating that they were illegally deprived of election victories.

Whether the due process and equal protection clauses of the 14th Amendment require that a state statute authorizing court challenges to elections be interpreted so as to afford a meaningful remedy, or whether it may be interpreted to compel a virtually impossible degree of knowledge—and pleading on the basis of that knowledge—

[1] The opinions are included in the Appendix at A and E.

within five days of the election, prior to discovery and any opportunity to examine the ballots.

Whether candidates for elective office who are "defeated" by a relatively small number of votes, and who are compelled by state statute to initiate court proceedings to challenge the elections within five days, may constitutionally be denied an opportunity to prove their allegations by a judicial interpretation of another portion of that statute so as to require a wholly unrealistic specificity of pleading.

Whether such "defeated" political candidates can constitutionally be compelled, in order to avoid dismissal of their complaints as legally insufficient, to plead facts of their own knowledge—and not on information and belief—sufficient to show on the face of the complaints that the frauds and irregularities prevented them from winning the elections.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 21-27 of Chapter 24, Illinois Revised Statutes, which reads as follows:

> *(Election contest—Petition.)* Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from such ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within 5 days after such election with the Clerk of the Circuit Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the election, within such

> 5 days, informing them that such complaint has been or will be filed. The judge of the Circuit Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such contest after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election of such city. In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of the court that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-16.

The above-quoted section is part of the Illinois Municipal Code, enacted in 1961. Article 21 is applicable only to the City of Chicago; Sections 21-22 through 21-35 deal with the "Election of Aldermen".

The 14th Amendment to the United States Constitution, Section 1 of which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASES

On February 23, 1971, the City of Chicago conducted two special elections to fill vacancies in the offices of

Alderman of the 21st Ward and Alderman of the 34th Ward. Petitioner Smith was a candidate in the 21st Ward, and Petitioner Savage was a candidate in the 34th Ward. The elections were conducted with paper ballots.

In the 21st Ward Petitioner Smith claimed to have won the election by more than 800 votes out of a total of 9,936. By reason of deliberate miscounts and other frauds, however, the official canvass recorded and the statutory election board proclaimed that Petitioner Smith's opponent (Stewart) had won by a vote of 5,227 to 4,709.

In the 34th Ward, Petitioner Savage claimed to have won the election by more than 600 votes out a total of 9,998. Again, by virtue of deliberate miscounts and other frauds, the official canvass recorded and the statutory election board proclaimed that Petitioner Savage's opponent (Frost) had won by a vote of 5,699 to 4,299.

Petitioners thereupon filed verified election contest complaints (App. C and G) within the five-day period required by Section 21-27 of Chapter 24 of the Illinois Revised Statutes. The portions of the complaints alleging vote frauds and irregularities were verified on information and belief. Among other things, the complaints prayed for a recount of the ballots. On March 24, 1971, the Circuit Court of Cook County dismissed Petitioners' complaints on the ground that they were legally insufficient under Section 21-27 (App. D and H). There was no discovery, the ballots were not examined and were not available for the Petitioners to inspect, and no evidence was heard.

Petitioner Smith's complaint. In his complaint (App. C), Petitioner Smith alleged that, but for the wrongful acts of the election judges, he would have won the election. Instead, his opponent was unlawfully declared the winner.

Specifically, Petitioner alleged that the vote totals for each candidate, as officially proclaimed, were false in 36 designated precincts, out of a total of 73, the election judges refused to count ballots lawfully marked for Petitioner, counted ballots which had not been properly marked for his opponent, counted ballots for Petitioner's opponent cast by persons who were not lawfully registered voters, and counted as votes for Petitioner's opponent ballots which had been lawfully marked for Petitioner. Paragraph 9 of the complaint further alleged, "by way of example only," certain specific wrongs in particular precincts: in the 17th precinct, at least 8 votes for Petitioner were not counted; in the 67th precinct at least 50 votes for Petitioner's opponent were illegally counted; and irregularities alleged in the counting of other precincts disclosed the following:[2]

	Votes for Petitioner		Votes for Opponent	
Precinct	Actual	Official Canvass	Actual	Official Canvass
21	129	63	63	129
53	93	74	74	93
42			42	100
59			85	(or less) 94
70	110	55	55	110

[2] If one makes the corrections in the vote totals called for by the specific allegations with regard to precincts 17, 67, 21, 53, 42, 59, and 70, Petitioner's vote total would have increased from 4,709 to 4,857; his opponent's total would have been decreased from 5,227 to 4,970. Thus the margin between the two candidates would be reduced to 113 votes—4,970 to 4,857. The switching of just 57 votes to Petitioner from his opponent would therefore overturn the election result. In addition, as noted in the text, the complaint alleged that, in other precincts, Petitioner was deprived of, and his opponent wrongfully awarded, at least 400 votes.

Above and beyond these specifically-alleged irregularities in particular precincts, the complaint alleged that "miscounting and other improprieties and wrongful acts by the judges of election in other precincts deprived [Petitioner] of more than 400 additional votes and wrongfully awarded to [Petitioner's opponent] at least 400 additional votes."

The complaint also alleged that "in many instances the judges of election refused to permit [Petitioner's] poll watchers to observe the making and recording of the count of the ballots," specifying two particular precincts, the 12th and the 24th.

The defendants filed answer to the complaint, denying the principal factual allegations and asserting that, in any event, the complaint was insufficient.[3]

The trial court dismissed the complaint as insufficient on its face (App. D).

Petitioner Savage's complaint. The complaint filed by Petitioner Savage (App. G) is similar to that of Petitioner Smith, containing the same basic allegations of fraud and misconduct on the part of the election judges. It plainly alleged that, but for the wrongful acts set out in the complaint, Petitioner would have won the election. It asserted that the votes officially tallied in 41 designated precincts, out of a total of 61, were false, and that the election judges refused to count ballots lawfully marked for Petitioner, counted ballots for his opponent which had not been properly marked, counted ballots for Petitioner's

[3] The defendants named were the Petitioner's election opponent (Stewart) and the three individuals constituting the Chicago Board of Election Commissioners.

opponent which had been lawfully marked for Petitioner, counted ballots for Petitioner's opponent which were invalid or spoiled or which were cast by persons who were not registered voters, and counted ballots for Petitioner's opponent which were cast by persons whose names and addresses on the registration record books were fictitious.

Paragraph 9 of the complaint went on to allege, "by way of example only," certain specific wrongs, including: the reporting of only 5 votes for Petitioner in the 2nd precinct and 7 votes for him in the 3rd precinct, the failure to count many additional votes for Petitioner in those precincts, and the refusal of the election judges to permit Petitioner's challengers in the 5th precinct to observe the conduct of the election. Petitioner's challengers were allegedly prevented from observing the count and tally of the ballots in 15 other precincts, his poll watchers and challengers were wrongfully ejected from the 6th precinct, and his watchers were wrongfully ejected from the 14th precinct. Further irregularities, as alleged in the complaint, resulted in the following estimated discrepancies between the ballots actually cast and those officially reported:

Precinct	Votes for Petitioner Actual	Votes for Petitioner Official Canvass	Votes for Opponent Actual	Votes for Opponent Official Canvass
5	155	120		
6	170	121	100	145
7	155	47	40	155
9	212	154		
10	272	175		
12	198	121		
14	223	3	23	243
16	223	57		
19	122	16	16	122
21	88	52	52	88
22	147	44	44	147
23	200	140		
32	252	222	150	182
34	120	52	52	120
49	229	15	15	229
52	58	12		

In addition, the complaint alleged that the ballots from the 31st precinct were not included in the official totals, and that Petitioner received 129 votes and his opponent 78 votes in that precinct.*

Above and beyond these specifically-alleged irregularities in particular precincts, the complaint alleged that "miscounting and other improprieties and wrongful acts by

* Making the corrections called for by the specific allegations with regard to precincts 5, 6, 7, 9, 10, 12, 14, 16, 19, 21, 22, 23, 32, 34, 49, 52, and 31, Petitioner's vote total would have been increased from 4,299 to 5,901; his opponent's total would have been decreased from 5,699 to 4,838. Thus, the correct vote totals asserted in the complaint showed that Petitioner actually won.

the judges of election deprived [Petitioner] of more than 500 additional votes and wrongfully awarded to [Petitioner's opponent] at least 500 additional votes."

In several precincts, according to the complaint, Petitioner's representatives obtained affidavits from registered voters who swore that they voted for Petitioner: 115 affidavits in the 14th precinct (where Petitioner was officially credited with 23 votes), 31 affidavits in the 19th precinct (where Petitioner was credited with 16 votes), and 34 affidavits in the 49th precinct (where Petitioner was credited with 15 votes)

As in Petitioner Smith's case, defendants denied the principal factual allegations and asserted that the complaint was insufficient. The trial court dismissed the complaint as insufficient on its face (App. H).

The decisions of the Appellate Court. The two opinions of the Appellate Court are virtually identical (App. A and E). After stating that "the sole issue . . . is whether the complaint is sufficient at law within the meaning of the election contest statute," the Court announced that under Illinois law the courts "are obligated to carefully insure that all the statutory procedures are fulfilled when an election contest complaint is filed." It then stated that the Petitioner did not allege "that irregularities in specific precincts would change the results of the election," but only set forth estimated differences in certain precincts between the official canvass and the number of votes actually cast, and it emphasized that "the estimates are not based on [Petitioners'] knowledge, but according to the verification . . . they are based on information and . . . belief that the estimates are true." Further, the Court asserted, Petitioners did not anywhere state the basis of their information or belief.

The Court therefore concluded that "since [Petitioners] chose to guess at or estimate discrepancies between the official and actual election results, [they] failed to satisfactorily allege that the irregularities would have effected the outcome of the election, as required by the statute." It added that candidates, such as Petitioners, "should not be permitted to overcome the sworn-to findings of [election judges] by merely estimating voting irregularities or by other general allegations of voting irregularities from which it cannot be inferred that the results would have been changed." The decisions of the trial court, dismissing the complaints as insufficient at law, were affirmed.

Constitutional Issues Raised. At the trial level, Petitioners each contended, in their memoranda in opposition to Respondents' motions to dismiss, that dismissal would violate the due process, equal protection, and privileges and immunities clauses of the United States Constitution. In their appellate briefs submitted to the Illinois Supreme Court, which subsequently transferred the causes to the Illinois Appellate Court, Petitioners again raised the federal constitutional issues. And in their petitions to the Illinois Supreme Court seeking review of the Illinois Appellate Court's decisions, Petitioners contended their federal constitutional rights under the due process and equal protection provisions of the Fourteenth Amendment were abridged.

REASONS FOR GRANTING THE WRIT

1. The issues presented are of major public importance, since the integrity of the voting process is at stake.

One of the most important principles of our representative democracy is that the citizens exercise ultimate control by the process of electing the men and women who represent them and act for them in the legislative and executive branches of government. As this Court stated in *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined." Unfair and unduly restrictive election procedures abridge the citizen's right to vote and his right freely to associate to advance his political beliefs. *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968); *cf. Moore* v. *Ogilvie*, 394 U.S. 814 (1969). A state cannot obstruct or dilute those fundamental liberties. *Cf. Briscoe* v. *Kusper*, 435 F. 2d 1046, 1053-54 (7th Cir. 1970).

The right of the citizen to vote and the right of a candidate to stand for election are nullified if the machinery for the casting and counting of ballots is tainted. If a citizen's ballot is not counted or is tallied for a candidate other than the one chosen by the voter, the election process becomes a fraud. Manipulated elections represent a danger to the very survival of representative government.

Election irregularities are nothing new in Chicago; unfortunately, they are probably more widespread in other areas of the country than most good citizens would like to believe. Unless there is a means available to the citizen or the candidate to attempt to correct such wrongs and to compel honest and fair elections, the

perpetrators of vote frauds become the rulers. They literally usurp the powers of the voters.

The Illinois General Assembly has prescribed a statutory procedure for defeated Aldermanic candidates in Chicago to follow when they believe that an election has been improperly conducted and the votes unlawfully and erroneously counted. Section 21-27 of Chapter 24 of the Illinois Revised Statutes, on its face, gives a remedy, notwithstanding the requirement that a complaint be filed in court within five days of the election. As construed by the Appellate Court of Illinois, however, that remedy is an illusion. It demands the impossible of a defeated candidate; namely, that he plead and verify of his own knowledge specific facts disclosing that he, rather than his opponent, won the election.

Thus, by reason of the decisions of the Appellate Court of Illinois, there is no remedy for vote fraud in Aldermanic elections in Chicago. If the doctrines announced by that court were to prevail generally, dishonest and rigged elections would be all but immune from correction. The ballot-box stuffers would rule. *Cf. United States* v. *Saylor*, 322 U.S. 385 (1944); *United States* v. *Classic*, 313 U.S. 299 (1941).[5]

The issues are truly of major significance.

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[5] Although this Court does not appear to have considered or ruled upon the precise issues presented by Petitioners, at least one District Court has held that the due process clause of the 14th Amendment requires that a defeated candidate have a judicial hearing as to the validity of the election. *Lehner* v. *O'Rourke*, 339 F. Supp. 309 (S. D. N. Y. 1971). Financial requirements used to condition the securing of a place on the ballot may offend the equal protection clause. *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Lubin* v. *Panish*, 94 S. Ct. 1315 (1974). It is a small benefit to a candidate to be able to get his name on the ballot if, when "defeated" by a fraudulent count, he cannot get a court to hear the merits of his charges of fraud.

2. Since the complaints were dismissed without the hearing of evidence and in the absence of an opportunity for Petitioners to examine the ballots or to have any discovery, Petitioners were deprived of their right to a judicial hearing.

The opinions of the Appellate Court are phrased in terms of the adequacy of pleadings. Stated very generally, the Appellate Court held that insufficient facts were pleaded and that the verifications were faulty. The net effect of the holding, however, was to foreclose the possibility of a hearing at which the facts could be uncovered and disclosed. The paper ballots themselves, quite obviously, would have constituted the basic, virtually determinative evidence as to which of the candidates were the legitimate victors.

Particularly significant is the fact that the trial court heard no evidence and did not examine the ballots; it simply determined that the complaints were insufficient as a matter of law. The Appellate Court affirmed, and the Illinois Supreme Court declined review. Consequently, at no time have Petitioners had an opportunity to attempt to prove the allegations of their complaints. Actually, when the complaints are examined, it is obvious that, within the stringent statutory five-day limitation, Petitioners succeeded in developing significant factual allegations showing that, were the votes counted honestly, the results would have been different. In fact, both Petitioners specifically alleged what the proper count of the votes would have been in many specified precincts. That complaints such as these can be summarily dismissed because, in the view of the Illinois courts, Petitioners were required to plead more facts more specifically and to verify them on the basis of personal knowledge is little short of incredible. When the burden on the pleader is

too demanding, substantive rights are inevitably sacrificed to the exigencies of strict pleading.

This Court has had occasion to review, admittedly in a different context, pleading and verification requirements. *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966). There, in considering the adequacy of a complaint and its verification under the then-existing Rule 23(b) of the Federal Rules of Civil Procedure, this Court, speaking through Mr. Justice Black, had the following to say about the role of pleading in an equitable judicial system (383 U.S. 363, 373):

> If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Those words are every bit as applicable to Section 21-27 of Chapter 24 of the Illinois Revised Statutes as they were to Rule 23(b). A proper and balanced interpretation of that statute, in its application to the complaints of Petitioners, compelled that there be a hearing on the merits. To allow the kind of strained construction of the statute which the Illinois courts have adopted is to sanction the use of pleading requirements, as in *Surowitz*, to "defeat the ends of justice."

The frauds alleged by Petitioners are as plainly charged as those by Dora Surowitz. Moreover, they were drafted and filed within five days of the elections in which the frauds were committed. The essential principles of justice which underlie this Court's pronouncement in *Surowitz* apply to Petitioners' complaints.

The due process clause of the 14th Amendment demands no less.

3. The decisions of the Illinois courts are destructive of the judicial process, since they all but compel dishonest pleading.

As determined by the courts below, a defeated candidate seeking to challenge an election for Alderman in the City of Chicago is placed in an intolerable position. Either he must act in good faith and set out such facts as he believes to be true-showing so far as he can that the results would have been changed by a proper count of the votes—and thereby risk that his complaint be dismissed. Or, to meet the absurd requirements imposed by the Illinois courts, he can allege and verify on the basis of knowledge facts specifying fraud and other improprieties sufficiently detailed and precise to withstand a motion to dismiss, regardless of the questionable validity of some of his allegations. The Illinois courts have thus created a situation in which a premium is placed upon dishonest, or at least exaggerated, pleading, since an honest pleading setting out the facts which the election challenger believes to be true most probably cannot prevent dismissal without the hearing of evidence. The standards required by the Illinois courts are particularly unfair, and therefore contrary to due process requirements, because complaints must be filed within five days of the election. This limited period obviously makes it extremely difficult for a defeated candidate to develop sufficient facts, which he can allege as a matter of personal knowledge, in a fashion sufficient to avoid summary dismissal. Veracity and good faith in pleading are sacrificed to narrow, strict standards which, within the time permitted, very few if any election contestants can hope to meet.

Taking the allegations of Petitioners' complaints as admitted, as they must be for purposes of considering

their legal sufficiency, it is obvious that enough facts were alleged to show that, if the facts were true, the results of the elections would have been different. Nonetheless, the Illinois Appellate Court held that the material alleged was insufficient even to permit inferring that the results would have been changed. This interpretation of the complaints is not only hopelessly strained and artificial, it ignores and denies what the complaints expressly state.

For the law to require the impossible is to make a mockery of the law. Not only do the pleading standards imposed by the Illinois courts serve the purpose of immunizing vote frauds, they encourage frauds on the courts in the form of verified allegations which, in truth and honesty, the pleader cannot, in the nature of things, really know.

CONCLUSION

For the foregoing reasons, it is urged that a Writ of Certiorari be granted to review the decisions below.

Respectfully submitted,

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APPENDIX A

PHILLIP G. SMITH, Plaintiff-Appellant, v. BENNETT M. STEWART *et al.*, Defendants-Appellees.

(No. 56746; Judgment affirmed.)

First District (5th Division)—October 12, 1973.

Appeal from the Circuit Court of Cook County; the Hon. Harry G. Comerford, Judge, presiding.

Mr. Justice Lorenz delivered the opinion of the court:

This is an appeal from an order dismissing plaintiff's complaint contesting the election of defendant, Bennett Stewart, as alderman of the twenty-first ward in the city of Chicago which was held on February 23, 1971.

The complaint stated in substance that plaintiff and defendant Stewart were the only candidates whose names appeared on the paper ballots used in that election; that the election was conducted under the supervision of defendants, Stanley J. Kusper, Chairman, and Francis P. Canary and Marie H. Suthers, members of the Chicago Board of Election Commissioners; that on February 25, 1971, the tallies of the seventy-three precincts comprising the twenty-first ward were canvassed and recorded and a proclamation issued by the Board declaring defendant Stewart as the duly elected alderman by a 5,227 to 4,709 vote margin; that a true count would establish that plaintiff, not defendant received a majority of the votes; that the election judges miscounted votes and declared defective ballots which were perfectly proper; that a specific number of votes in specific precincts were miscounted; that an *estimated* specific number of votes in the other precincts were miscounted; and that plaintiff's duly qualified poll watchers were improperly excluded in specific precincts. Finally, plaintiff prays that a recount be made or, in the alternative, that the court

declare plaintiff the winner and duly elected alderman of the twenty-first ward.

The trial court dismissed the complaint on the basis that it was insufficient in law, and plaintiff appealed to the Illinois Supreme Court, and it was transferred to this court. The sole issue presented for review is whether the complaint is sufficient in law within the meaning of the election contest statute.

OPINION

The right to contest an election is a statutory one designed to effectuate the will of the people through orderly democratic procedures. *Smith* v. *Township High School Dist.*, 335 Ill. 346, 167 N.E. 76; *Wagler* v. *Stoecker*, 393 Ill. 560, 66 N.E.2d 408.

Section 21—27 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, §21—27) provides that upon the filing of an election contest complaint "In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed." Since there is no claim that the candidate who appears to have been elected on the face of the return was not duly elected, the only issue before us is whether the complaint is insufficient in law. In *Zahray* v. *Emricson*, 25 Ill.2d 121, 124, 182 N.E.2d 756, 758, the Illinois Supreme Court, in affirming the dismissal of petitions to contest an election, stated: "Equally certain is the principle that the proceedings cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge." In following this principle the courts are obligated to insure carefully that all the statutory procedures are fulfilled when an election contest complaint is filed. The complaint in the case at bar falls far short of affording a basis for the contest sought. We follow *McCaslin* v. *Moore*, 67 Ill.App.

2d 355, 214 N.E.2d 18, in holding that plaintiff's general allegation in the complaint that "a true count would establish that plaintiff, not defendant received a majority of the votes" is insufficient to meet the statutory requirement. Plaintiff does not allege that irregularities in specific precincts would change the result of the election. In paragraph 9 of his complaint he sets forth specific differences in specific precincts between the canvass and the number of votes cast. The total effect of these differences would merely reduce defendant's margin of victory from 518 votes to 113 votes. To overcome the 113 vote margin, plaintiff further sets forth in paragraph 9 "as an example" differences in certain estimates of precincts between the canvass and the number of votes actually cast. Even then the estimates are not based on plaintiff's knowledge, but according to the verification of his complaint they are based on information and his belief that the estimates are true. Nowhere does he state the basis of his information or belief. We hold, therefore, as we did in *Savage* v. *Frost,* 14 Ill.App.3d 1036, that since plaintiff chose to guess at or estimate discrepancies between the official and actual election results, he failed to satisfactorily allege that the irregularities would have affected the outcome of the election, as required by the statute.

The case of *Smiley* v. *Lenane,* 363 Ill. 66, 1 N.E.2d 213, relied upon heavily by plaintiff, is distinguishable from the case at bar. In *Smiley,* the complaint found to be legally sufficient did not involve estimates, as does the present case.

Plaintiff next contends that the decision of the trial court violates his federal and state constitutional rights. He cites no authority nor could we find any, even suggesting that the statutory requirement is unconstitutional.

In accordance with section 18—9 of the Election Code (Ill. Rev. Stat. 1969, ch. 46, par. 18—9) the election judges entered the tallies and returned the canvass sheets

to the Board of Election Commissioners. The judges certified on the face of each canvass sheet that the results are correct. These judges are officers of the circuit court of Cook County. A candidate defeated by at least 113 votes (even assuming plaintiff's allegations of *specific* discrepancies are true) should not be permitted to overcome the sworn-to findings of these officers by merely estimating voting irregularities or by other general allegations of voting irregularities or by other general allegations of voting irregularities from which it cannot be inferred that the results would have been changed. Since plaintiff chose not to amend his complaint to comply with section 21—27 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, § 21—27) we find that the complaint was insufficient in law.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

DRUCKER, P.J., and SULLIVAN, J., concur.

APPENDIX B

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

January 30, 1974

Mr. Howard Eglit
American Civil Liberties Union
Six South Clark
Chicago, Ill. 60603

No. 46350—Phillip G. Smith, petitioner, v. Bennett M. Stewart, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petitions for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court

APPENDIX C

IN THE
CIRCUIT COURT OF COOK COUNTY
COUNTY DIVISION

Philip G. Smith, Plaintiff, v. Bennett M. Stewart and Stanley J. Kusper, Jr., Francis P. Canary, and Marie H. Suthers, individually and (in the case of the latter three) as together constituting The Chicago Board of Election Commissioners, Defendants.	No. 71C 0283

COMPLAINT

ELECTION CONTEST PETITION

Plaintiff Philip G. Smith, pursuant to Section 21-27, Chapter 24, Illinois Revised Statutes, 1969, (a) contests the purported election on February 23, 1971 of defendant Bennett M. Stewart as Alderman for the 21st Ward of the City of Chicago, Illinois, (b) petitions this Court, and (c) complains of the defendants Bennett M. Stewart (who is called "Stewart" in this complaint) and Stanley J. Kusper, Jr., Francis J. Canary, and Marie H. Suthers (who are named both individually and as together constituting the Chicago Board of Election Commissioners and who are sometimes referred to as "the Board" in this complaint) as follows:

THE ELECTION, CANVASS, AND OFFICIAL PROCLAMATION.

1. On February 23, 1971 an election for the office of Alderman of the 21st Ward of the City of Chicago was conducted under the general supervision of this Court

and the Board. Voting for the office of Alderman was by paper ballot. The names of two candidates appeared on the aldermanic ballot: Plaintiff was one, the defendant Stewart was the other. On Thursday, February 25, 1971, the purported tallies of the results of the voting in each of the 73 precincts of the 21st Ward were canvassed and recorded by representatives of the Board. On Monday, March 1, 1971, the results of that canvass were officially proclaimed by the Board as follows: Plaintiff, 4,709 votes; defendant Stewart, 5,227 votes. Defendant Stewart was thus proclaimed the duly elected Alderman of the 21st Ward. (The above events are referred to in this complaint as, respectively, the "election", the "canvass", and the "official proclamation".)

THE PLAINTIFF

2. Plaintiff is:

(a) One of the two candidates whose names appeared on the ballot in the election.

(b) A citizen, resident, and duly qualified voter and elector of the 21st Ward, in that:

(i) He is more than 21 years of age;

(ii) He has resided continuously for more than one year at 9419 South Forest Avenue within the 21st Ward;

(iii) He has for many years been, and continues to be, a duly registered voter and elector at addresses within the 21st Ward;

(iv) He lawfully voted in the election.

THE DEFENDANTS

3. Defendant Stewart is the candidate whose purported election was proclaimed by the Board on Monday, March 1, 1971.

4. Defendants Kusper, Canary, and Suthers (the "Board") were charged by this Court and by the statutes of Illinois with the responsibility for the conduct of the election, the canvass and the official proclamation. The

Board has possession, custody and control of the ballots, affidavits, poll books, binders, tally papers, returns, registers, applications to vote, and other papers and paraphernalia which were used in the election and which constitute, embody, or reflect its conduct, content, or result.

THE PRECINCTS INVOLVED

5. Plaintiff contests the tallied, canvassed, and proclaimed count of the vote in the election in the following precincts of the 21st Ward:

Precinct No.:

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6. In the event that this Court should rule that plaintiff is not permitted by law to contest the count in specific selected precincts (as specified in paragraph 5, above) then, in the alternative, plaintiff contests the tallied, canvassed, and proclaimed count of the vote in the election in every one of the 73 precincts of the 21st Ward.

THE WRONG ALLEGED

7. The tallied, canvassed, and proclaimed vote totals for each candidate in each of the precincts referred to in paragraphs 5 and 6, above, and in the 21st Ward as a whole, are false. The true count of the votes duly and lawfully cast in each of such precincts and in the 21st Ward as a whole will establish that plaintiff—and not defendant Stewart—received a majority of such votes so cast in the election. In truth, plaintiff did in fact receive such a majority and was in fact elected Alderman of the 21st Ward in the election. In truth, plaintiff received in excess of 5,400 lawful votes and defendant Stewart received less than 4,600 lawful votes in the election.

8. During the election, the judges of election in the precincts referred to in paragraphs 5 and 6, above, wilfully and fraudulently (or, in the alternative, negligently and carelessly) did the following:

(a) They failed and refused to count and tally all of the ballots which had been lawfully marked and cast for plaintiff;

(b) They counted and tallied ballots which had not been cast or had not been lawfully marked and cast for defendant Stewart;

(c) They counted and tallied as votes for defendant Stewart ballots which had in fact been lawfully marked and cast for plaintiff;

(d) They signed certificates not showing the true and correct votes cast by voters as shown by the ballots;

(e) They declared as "spoiled" or "defective and objected to" properly and lawfully marked ballots which had been cast for plaintiff, and they refused to count such ballots;

(f) They counted as votes for the defendant Stewart ballots which were not properly and lawfully marked and cast but which were, in fact, spoiled and defective;

(g) They counted as votes for the defendant Stewart ballots cast by persons who were not duly and lawfully registered voters in the precincts where they voted;

(h) They counted for the defendant Stewart absentee ballots which had not been marked, returned and cast in accordance with the Statute;

(i) They committed many other wrongful and unlawful errors, omissions, mistakes, and unlawful acts which had the effect of wrongfully depriving plaintiff of lawful votes and wrongfully adding to the count of defendant Stewart.

9. By way of example only, and not in limitation of the generality of the above allegations, the following specific wrongs were committed during the election by judges of election in the 21st Ward:

(a) In the 17th precinct, at least eight votes for Smith were arbitrarily disregarded and not tallied by the judges of election.

(b) In the 21st precinct the judges of election tallied and certified that defendant Stewart received 129 votes

and plaintiff 63 votes when, in fact, the true result was just the opposite.

(c) In the 53rd precinct the judges of election tallied and certified that defendant Stewart received 93 votes and plaintiff 74 votes when, in fact, the true result was just the opposite.

(d) In the 42nd precinct the judges of election tallied and certified that defendant Stewart received 100 votes when, in fact, he received only 42 votes.

(e) In the 59th precinct the true vote for defendant Stewart was 85 votes or less, but the judges of election tallied and certified that defendant Stewart received 94 votes.

(f) In the 67th precinct, at least 50 votes for defendant Stewart were improperly and illegally cast, tallied and counted.

(g) In the 70th precinct the judges of election tallied and certified that defendant Stewart received 110 votes and plaintiff 55 votes when, in fact, the true result was just the opposite.

(h) Miscounting and other improprieties and wrongful acts by the judges of election in other precincts deprived plaintiff of more than 400 additional votes and wrongfully awarded to defendant Stewart at least 400 additional votes.

i) In many instances the judges of election refused to permit plaintiff's poll watchers to observe the making and recording of the count of the ballots. Among others, plaintiff's poll watchers in the following precincts were so deprived of their right to observe the count: Precincts 12 and 24.

9-1. In any event, defendant Stewart received less than 50% of all the ballots cast for the office of Alderman (including those ballots which were not counted for either plaintiff or for Stewart because they were

defectively marked or otherwise spoiled) and therefore he has not been duly or legally elected, and a new election must be held in accordance with the prayer of paragraph 11(f), below.

9-2. As a consequence of the wrongdoing set forth in paragraphs 8 and 9, above, defendant Stewart has wrongfully and unlawfully been proclaimed the winner of the election and the Alderman of the 21st Ward, when, but for said wrongdoing, plaintiff would be such winner and Alderman.

10. On February 28, 1971, plaintiff caused a copy of this complaint and the notice which is attached to this complaint as Exhibit "A" to be served upon defendant Stewart and, on March 1, 1967, upon the other defendants as set forth in the proof of service which is attached to said notice.

11. Wherefore, plaintiff prays:

a) that summons issue returnable as provided by law to the Sheriff of Cook County, Illinois, commanding that he summon defendants to appear before this Court at the time and manner as by statute provided to answer this complaint;

(b) that the election returns, ballots, tally sheets, poll books, voter applications, and all election supplies and paraphernalia of the said election of February 23, 1971 for the office of Alderman of the 21st Ward of the City of Chicago be brought into this Court and a recount of the precincts of said Ward as described in paragraphs 5 and 6, above, be had of all ballots legally cast or voted for the plaintiff, and the defendant Stewart for the office of Alderman of the 21st Ward of the City of Chicago under the direction and supervision of this Court;

(c) that the many errors, inaccuracies, mistakes and omissions in the count and returns of the ballots be inquired into and that a full, true and correct count of

the ballots be had under the direction and supervision of this Court as provided for by statute, and that the true, correct and lawful result of the election for the office of Alderman of the 21st Ward of the City of Chicago be ascertained, determined and declared and that the various inaccuracies, errors, mistakes and miscount of said ballots and returns be corrected;

(d) that if upon recount of the legal ballots it is shown that the plaintiff had and did receive more of the legal votes cast at said election held on February 23, 1971 for the office of Alderman of the 21st Ward of the City of Chicago than the defendant Stewart then in that event this Court find, order and declare by its order and decree that the plaintiff was duly and lawfully elected at said election held on February 23, 1971 to the office of Alderman of the 21st Ward of the City of Chicago and that the proper official of the City of Chicago be directed to certify the name of the plaintiff as the duly elected Alderman of the 21st Ward of the City of Chicago;

(e) that pending the hearing of this contest this Court make and enforce all necessary orders for the preservation and production of the ballots, affidavits, poll books, tally papers, returns, registers, applications to vote, and other papers or evidence that may bear upon this contest in order that the same may be used upon the hearing of this contest and be preserved as required by law and that plaintiff may have such action and further relief as this Court deems meet;

(f) that in the event the Court finds that the allegations of paragraph 9-1 are true and correct, that the Court order a new election between plaintiff and the defendant Stewart in the 21st Ward on some convenient date.

/s/ Philip G. Smith
Plaintiff

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

Philip G. Smith being first duly sworn, on oath deposes and says that he is the plaintiff in the above and foregoing Complaint, that he has read the above and foregoing Complaint subscribed by him, that he knows the contents thereof and that the same is true of his own knowledge in substance and in fact except as to those matters alleged in the following paragraphs, which are alleged on information and belief and which he believes to be true: Paragraphs 7, 8, and 9.

/s/ Philip G. Smith

Subscribed and sworn to
before me this 1st day of
March, 1971.
/s/ Mary Law Ryan
Notary Public

DONALD PAGE MOORE
Suite 3200
69 West Washington Street
Chicago, Illinois 60602
346-0900
Attorney for Plaintiff

APPENDIX D

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — COUNTY DIVISION

Philip G. Smith,
Plaintiff,
v.
Bennett M. Stewart, et al.,
Defendants.
No. 71 Co. 0283

ORDER

This cause coming on to be heard on the complaint and answers of the several defendants, and it appearing that the defendant Stewart has asserted that the complaint is not sufficient in law, and the Court having listened to the arguments of counsel and having given full consideration to those arguments, memoranda filed by counsel and the complaint and answers herein, finds:

1. The complaint herein is not sufficient in law within the meaning of Ill. Rev. Stats. (1969) Ch. 24, § 21-27.

2. The complaint herein should be dismissed in accordance with the foregoing statutory provision.

It is therefore ordered, adjudged and decreed that the complaint be, and it is hereby dismissed.

On the oral motion of plaintiff that they be required so to do, it is further ordered that pending final disposition of any appeal from the foregoing order the defendants Kusper, Suthers, and Canary, both individually and as together constituting the Chicago Board of Election Commissioners shall impound, keep, and preserve inviolate all of the ballots, voter applications, absentee ballots, affidavits, binders, poll books, certificates, tallies, lists, registers, reports, and other papers, books and records which were used in connection with the aldermanic election of February 23, 1971, in the 21st Ward or any of its precincts.

ENTER: .....
HARRY G. COMERFORD
Circuit Judge

March 24, 1971

APPENDIX B

AUGUSTUS A. SAVAGE, Plaintiff-Appellant, v. WILSON FROST *et al.*, Defendants-Appellees.
(No. 56750; Judgment affirmed.)

First District (5th Division)—October 12, 1973.

Appeal from the Circuit Court of Cook County; the Hon. Harry G. Comerford, Judge, presiding.

Mr. Justice Lorenz delivered the opinion of the court:

This is an appeal from an order dismissing plaintiff's complaint contesting the election of defendant, Wilson Frost, as alderman of the thirty-fourth ward in the city of Chicago which was held on February 23, 1971.

The complaint stated in substance that plaintiff and defendant Frost were the only candidates whose names appeared on the paper ballots used in that election; that the election was conducted under the supervision of defendants, Stanley J. Kusper, Chairman, and Francis P. Canary and Marie H. Suthers, members of the Chicago Board of Election Commissioners; that on February 25, 1971, the tallies of the sixty-one precincts comprising the thirty-fourth ward were canvassed and recorded and a proclamation issued by the Board declaring defendant Frost as the duly elected alderman by a 5,961 to 4,359 vote margin; that a true count would establish that plaintiff, not defendant received a majority of the votes; that the election judges miscounted votes, declared defective ballots which were perfectly proper, and concealed ballot applications from plaintiff's poll watchers; that an *estimated* specific number of votes in specific precincts were miscounted; that plaintiff's duly qualified poll watchers were improperly excluded in specific precincts; and that plaintiff's poll watchers were intimidated from properly performing their duties by election judges.

Finally, plaintiff prays that a recount be made or, in the alternative, that the court declare plaintiff the winner and duly elected alderman of the thirty-fourth ward.

The trial court dismissed the complaint on the basis that it was insufficient in law, and plaintiff appealed to the Illinois Supreme Court, and it was transferred to this court. The sole issue presented for review is whether the complaint is sufficient in law within the meaning of the election contest statute.

OPINION

1 The right to contest an election is a statutory one designed to effectuate the will of the people through orderly democratic procedures. *Smith* v. *Township High School Dist.,* 335 Ill. 346, 167 N.E. 86; *Wagler* v. *Stoecker,* 393 Ill. 560, 66 N.E.2d 408.

2 Section 21-27 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, § 21-27) provides that upon the filing of an election contest complaint, "In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed." Since there is no claim that the candidate who appears to have been elected on the face of the return was not duly elected, the only issue before us is whether the complaint is insufficient in law. In *Zahray* v. *Emricson,* 25 Ill.2d 121, 124, 182 N.E.2d 756, 758, the Illinois Supreme Court, in affirming the dismissal of petitions to contest an election, stated: "Equally certain is the principle that the proceedings cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge." In following this principle the courts are obligated to insure carefully that all the statutory procedures are fulfilled when an election contest complaint is filed. The complaint in the case at bar falls far short of affording a basis for the contest sought.

We follow *McCaslin* v. *Moore,* 67 Ill.App.2d 355, 214 N.E. 2d 18, in holding that plaintiff's general allegations in the complaint that "a true count would establish that plaintiff, not defendant, received a majority of the votes" is insufficient to meet the statutory requirement. Plaintiff does not allege that irregularities in specific precincts would change the result of the election. Only in paragraph 9 of his complaint does he set forth "as an example" differences in certain estimates of precincts between the canvass and the actual number of votes cast. Even then the estimates are not based on plaintiff's knowledge, but according to the verification of his complaint, they are based on information and his belief that the estimates are true. Nowhere does he state the basis of either his information or belief. We hold, therefore, that since plaintiff chose to guess at or estimate discrepancies between the official and actual election results, he failed to satisfactorily allege that the irregularities would have affected the outcome of the election, as required by the statute.

The case of *Smiley* v. *Lenane,* 363 Ill. 66, 1 N.E.2d 213, relied upon heavily by plaintiff, is distinguishable from the case at bar. In *Smiley,* the complaint found to be legally sufficient did not involve estimates, as does the present case.

Plaintiff next contends that the decision of the trial court violates his federal and state constitutional rights. He cites no authority nor could we find any, even suggesting that the statutory requirement is unconstitutional.

3 In accordance with section 18-9 of the Election Code (Ill. Rev. Stat. 1969), ch. 46, § 18-9) the election judges entered the tallies and returned the canvass sheets to the Board of Election Commissioners. The judges certified on the face of each canvass sheet that the results are correct. These judges are officers of the circuit court of Cook County. A candidate defeated by 1,602 votes should not be permitted to overcome the sworn-to find-

ings of these officers by merely estimating voting irregularities or by other general allegations of voting irregularities from which it cannot be inferred that the results would have been changed. Since plaintiff chose not to amend his complaint to comply with section 21-27 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, § 21-27) we find that the complaint was insufficient in law.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

DRUCKER, P. J., and SULLIVAN, J., concur.

APPENDIX F

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

January 30, 1974

American Civil Liberties Union
Six South Clark
Chicago, Ill. 60603

No. 46351—Augustus A. Savage, petitioner, vs. Wilson Frost, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petitions for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court

APPENDIX G

IN THE
CIRCUIT COURT OF COOK COUNTY
COUNTY DIVISION

Augustus A. Savage, Plaintiff, vs. Wilson Frost and Stanley J. Kusper, Jr., Francis P. Canary, and Marie H. Suthers, individually and (in the case of the latter three) as together constituting the Chicago Board of Election Commissioners, Defendants.	No. 71C 0282

COMPLAINT
ELECTION CONTEST PETITION

Plaintiff Augustus A. Savage, pursuant to Section 21-27, Chapter 24, Illinois Revised Statutes, 1969, (a) contests the purported election on February 23, 1971 of defendant Wilson Frost as Alderman for the 34th Ward of the City of Chicago, Illinois, (b) petitions this Court, and (c) complains of the defendants Wilson Frost (who is called "Frost" in this complaint) and Stanley J. Kusper, Jr., Francis J. Canary, and Marie H. Suthers (who are named both individually and as together constituting the Chicago Board of Election Commissioners and who are sometimes referred to as "the Board" in this complaint) as follows:

THE ELECTION, CANVASS AND OFFICIAL PROCLAMATION

1. On February 23, 1971 an election for the office of Alderman of the 34th Ward of the City of Chicago was

conducted under the general supervision of this Court and the Board. Voting for the office of Alderman was by paper ballot. The names of two candidates appeared on the aldermanic ballot: Plaintiff was one, the defendant Frost was the other. On Thursday, February 25, 1971, the purported tallies of the results of the voting in each of the 61 precincts of the 34th Ward were canvassed and recorded by representatives of the Board. On Monday, March 1, 1971, the results of that canvass were officially proclaimed by the Board as follows: Plaintiff, 4,299 votes; defendant Frost, 5,699 votes. Defendant Frost was thus proclaimed the duly elected Alderman of the 34th Ward. (The above events are referred to in this complaint as, respectively, the "election", the "canvass", and the "official proclamation".)

THE PLAINTIFF

2. Plaintiff is:

(a) One of the two candidates whose names appeared on the ballot in the election.

(b) A citizen, resident, and duly qualified voter and elector of the 34th Ward, in that:

(i) He is more than 21 years of age;

(ii) He has resided continuously for more than four years at 9907 South Morgan Street, which is now within the 34th Ward;

(iii) He has for more than three years been, and continues to be, a duly registered voter and elector at the above address.

(iv) He lawfully voted in the election.

THE DEFENDANTS

3. Defendant Frost is the candidate whose purported election was proclaimed by the Board on Monday, March 1, 1971.

4. Defendants Kusper, Canary, and Suthers (the "Board") were charged by this Court and by the statutes

of Illinois with the responsibility for the conduct of the election, the canvass and the official proclamation. The Board has possession, custody and control of the ballots, poll books, binders, tally papers, returns, registers, applications to vote, and other papers and paraphernalia which were used in the election and which constitute, embody, or reflect its conduct, consent, or result.

THE PRECINCTS INVOLVED

5. Plaintiff contests the tallied, canvassed, and proclaimed count of the vote in the election in the following precincts of the 34th Ward:

Precinct No.:

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6. In the event that this Court should rule that plaintiff is not permitted by law to contest the count in specific selected precincts (as specified in paragraph 5, above) then, in the alternative, plaintiff contests the tallied, canvassed, and proclaimed count of the vote in the election in every one of the 61 precincts of the 34th Ward.

THE WRONG ALLEGED

7. The tallied, canvassed, and proclaimed vote totals for each candidate in each of the precincts referred to in paragraphs 5 and 6, above, and in the 34th Ward as a whole, are false. The true count of the votes duly and lawfully cast in each of such precincts and in the 34th Ward as a whole will establish that plaintiff—and not defendant Frost—received a majority of such votes so cast in the election. In truth, plaintiff did in fact receive such a majority and was in fact elected Alderman of the 34th Ward in the election. In truth, plaintiff received in excess of 5,300 lawful votes and defendant Frost received less than 4,700 lawful votes in the election.

8. During the election, the judges of election in the precincts referred to in paragraphs 5 and 6, above, wilfully and fraudulently (or, in the alternative, negligently and carelessly) did the following:

(a) They failed and refused to count and tally all of the ballots which had been lawfully marked and cast for plaintiff;

(b) They counted and tallied ballots which had not been cast or had not been lawfully marked and cast for defendant Frost;

(c) They counted and tallied as votes for defendant Frost ballots which had in fact been lawfully marked and cast for plaintiff;

(d) They signed certificates not showing the true and correct votes cast by voters as shown by ballots;

(e) They declared as "spoiled" or "defective and objected to" properly and lawfully marked ballots which had been cast for plaintiff, and they refused to count such ballots;

(f) They counted as votes for the defendant Frost ballots which were not properly and lawfully marked and cast but which were, in fact, spoiled and defective;

(g) Counted votes cast for the defendant, Wilson Frost, by persons who were not registered voters, persons who voted more than once, and by persons whose names and addresses on the registration record books were fictitious;

(h) Concealed applications for ballots from plaintiff's poll watchers and allowing voters to be assisted in voting without signing the necessary affidavits;

(i) They counted as votes for the defendant Frost ballots cast by persons who were not duly and lawfully registered voters in the precincts where they voted;

(j) They counted for the defendant Frost absentee ballots which had not been marked, returned and cast in accordance with the Statute;

(k) They committed many other wrongful and unlawful errors, omissions, mistakes, and unlawful acts which had the effect of wrongfully depriving plaintiff

of lawful votes and wrongfully adding to the count of defendant Frost.

9. By way of example only, and not in limitation of the generality of the above allegations, the following specific wrongs were committed during the election by judges of election in the 34th Ward:

(a) In reporting only 5 votes for plaintiff in the 2nd precinct and 7 votes in the 3rd precinct, plaintiff believes that the judges of election in such precincts failed to count, tally and report many votes which were lawfully cast for him in such precincts.

(b) The duly qualified and accredited watchers and challengers for the plaintiff in the 5th precinct were prevented by the judges of election from properly observing the conduct of the election and whether ballots were being counted and tallied correctly, and plaintiff estimates that a recount of ballots cast in said precinct will disclose that the plaintiff received more than 155 votes instead of the 120 votes credited to him at the canvass.

(c) Duly qualified and accredited watchers and challengers for plaintiff in the 4th, 6th, 7th, 9th, 10th, 12th, 14th, 16th, 19th, 22nd, 23rd, 29th, 31st, 34th, and 49th precincts were prevented by said judges from observing the count and tally of the ballots.

(d) In the 6th precinct, one of plaintiff's duly qualified and accredited watchers and challengers was wrongfully ejected from the polling place prior to the count. Plaintiff estimates that a recount of the ballots cast in said precinct will disclose that the plaintiff received more than 170 votes instead of the 121 votes given him in the canvass, and that the defendant, Wilson Frost, received less than 100 votes instead of 145 votes given him in the canvass.

(e) Plaintiff estimates that a recount of the ballots cast in the election in precinct 7 will show that about 155 votes were cast for him in said precinct instead of 47 credited to him in said official canvass, and that

the defendant, Wilson Frost received about 40 votes instead of 121 votes credited to him in the canvass.

(f) Plaintiff estimates that a recount of ballots cast in 9th precinct will disclose that he received at least 212 votes instead of the 154 votes credited to him in the canvass.

(g) In the 10th precinct, 272 votes were in fact cast for plaintiff. However, the judges of election and the Board arbitrarily and unlawfully failed and refused to tally, count or report 97 of those 272 votes as having been cast for plaintiff.

(h) In the 12th precinct, plaintiff estimates that a recount of ballots cast in said precinct will disclose that about 198 votes were cast in said precinct for the plaintiff instead of 121 votes credited to him in the canvass.

(i) The duly qualified and accredited watchers of the plaintiff in precinct 14 were arbitrarily and illegally put out of the polling place at 6:00 p.m. when the polls were closed, and the plaintiff was therefore illegally and fraudulently deprived of watchers in his behalf. The plaintiff is informed and believes a recount of ballots cast in said precinct will disclose that 223 ballots were cast for the plaintiff instead of the 3 ballots credited to him in said official canvass, and that 23 ballots were cast for the defendant, Wilson Frost, instead of 243 votes credited to him in the official canvass. Representatives of plaintiff have already obtained at least 115 affidavits from registered voters who voted in the 14th precinct and who have sworn under oath that they voted for plaintiff in the election.

(j) In the 16th precinct plaintiff estimates that a recount of ballots in said precinct will disclose that 223 votes were cast for the plaintiff instead of the 57 votes credited to him in the canvass.

(k) In the 19th precinct plaintiff estimates that a recount of ballots cast in said precinct will disclose that 122 ballots were cast for the plaintiff instead of the 16 credited to him on the canvass, and that 16 votes

were cast for the defendant Frost instead of the 122 credited to him in the canvass. Representatives of plaintiff have already obtained at least 31 affidavits from registered voters who voted in the 19th precinct and who have sworn under oath that they voted for plaintiff in the election.

(l) In the 21st precinct, plaintiff estimates that a recount of ballots cast in said precinct will disclose that plaintiff received 88 votes instead of the 52 votes credited to him in the canvass, and that the defendant Wilson Frost received 52 votes instead of 88 votes credited to him in the canvass.

(m) In the 22nd precinct, plaintiff estimates that a recount of the ballots cast in said precinct in said election will disclose that plaintiff received 147 votes instead of the 44 votes credited to him in said official canvass and the defendant Frost will receive 44 votes instead of the 147 votes given to him in the canvass.

(n) In the 23rd precinct, plaintiff estimates that a recount of the ballots cast in said precinct will disclose that the plaintiff received 200 instead of 140 votes credited to him in the canvass.

(o) In the 31st precinct, the ballots cast were not counted or tallied by the precinct election judges; that the ballot boxes and ballots were taken to and deposited with the Board of Election Commissioners of Chicago, on the 3rd floor of the City Hall on the night of said election; that said ballot boxes, records, and ballots cast in said election in said precinct 31 were not produced and were not available at the official canvass and were not included in the record of said official canvass. The plaintiff states that an examination of the ballots cast in said precinct will show that he received 129 votes and the defendant, Wilson Frost, received 78 votes.

(p) One Walter Harris, a Democrat judge of election of the 32nd precinct of said 34th Ward, wore a loaded, openly exposed revolver during the day of the election and the period of counting and tallying of the ballots

after the close of the polls. Said Harris harassed and intimidated the duly accredited watchers for the plaintiff thereby preventing them from performing their functions as watchers and challengers for the plaintiff; that the said Democrat judge of election was observed illegally marking ballots for voters. Plaintiff estimates that a recount of the ballots cast in said precinct will disclose that the plaintiff received 252 votes instead of 222 credited to him in the official canvass, and the defendant, Wilson Frost, received less than 150 votes instead of 182 credited to him in the official canvass.

(q) In the 34th precinct plaintiff estimates that a recount of the votes cast in said precinct will disclose that the plaintiff received 120 votes instead of the 52 credited to him in the canvass, and the defendant Frost received 52 votes instead of the 120 votes credited to him in said canvass.

(r) The duly accredited watchers and challengers for the plaintiff were ejected from the polling place in the 49th precinct of said Ward, and were not allowed to return, thereby illegally depriving the plaintiff of watchers and challengers, and that the plaintiff is informed and believes and upon such information and belief states that a recount of the votes cast in said precinct will disclose that the plaintiff received 229 votes instead of 15 votes credited to him in said official canvass, and the defendant Frost will receive 15 votes instead of 229 votes credited to him in the official canvass. Representatives of plaintiff have already obtained 34 signed and sworn affidavits from duly registered voters in the 49th precinct in which each of said voters swears that he voted for plaintiff in the election.

(s) In the 52nd precinct, plaintiff estimates that a recount of the ballots will disclose that he received 58 votes instead of the 12 votes credited to him in the canvass.

(t) Miscounting and other improprieties and wrongful acts by the judges of election in other precincts deprived plaintiff of more than 500 additional votes and wrongfully awarded to defendant Frost at least 500 additional votes.

10. Exhibit "A" to this compliant sets forth, with reference to each precinct in the 34th Ward, the "Aldermanic Ballots Requested" totals, and the respective votes for plaintiff and defendant Frost, per the canvass. Exhibit "A" also sets forth the allegedly "spoiled ballots" (as declared by the judges of election) and the number of ballots unaccounted for in each precinct.

11. In any event, defendant Frost received less than 50% of all the ballots cast for the office of Alderman (including those ballots which were not counted for either plaintiff or for Frost because they were defectively marked or otherwise spoiled) and therefore he has not been duly or legally elected, and a new election must be held in accordance with the prayer of paragraph 14(f) below.

12. As a consequence of the wrongdoing set forth in paragraphs 8 and 9, above, defendant Frost has wrongfully and unlawfully been proclaimed the winner of the election and the Alderman of the 34th Ward, when, but for said wrongdoing, plaintiff would be such winner and Alderman.

13. On February 28, 1971, plaintiff caused a copy of this complaint and the notice which is attached to this complaint as Exhibit "B" to be served upon defendant Frost and, on March 1, 1971, upon the other defendants as set forth in the proof of service which is attached to said notice.

14. Wherefore, plaintiff prays:

(a) that summons issue returnable as provided by law to the Sheriff of Cook County, Illinois, commanding that he summon defendants to appear before this Court at the time and manner as by statute provided, to answer this complaint;

(b) that the election returns, ballots, tally sheets, poll books, voter applications, and all election supplies and paraphernalia of the said election of February 23, 1971 for the office of Alderman of the 34th Ward of the City of Chicago be brought into this Court and a recount of the precincts of said Ward as described in paragraphs 5

and 6, above, be had of all ballots legally cast or voted for the plaintiff, and the defendant Frost for the office of Alderman of the 34th Ward of the City of Chicago under the direction and supervision of this Court;

(c) that the many errors, inaccuracies, mistakes and omissions in the count and returns of the ballots be inquired into and that a full, true and correct count of the ballots be had under the direction and supervision of this Court as provided for by statute, and that the true, correct and lawful result of the election for the office of Alderman of the 34th Ward of the City of Chicago be ascertained, determined and declared and that the various inaccuracies, errors, mistakes and miscount of said ballots and returns be corrected;

(d) that if upon recount of the legal ballots it is shown that the plaintiff had and did receive more of the legal votes cast at said election held on February 23, 1971 for the office of Alderman of the 34th Ward of the City of Chicago than the defendant Frost then in that event this Court find, order and declare by its order and decree that the plaintiff was duly and lawfully elected at said election held on February 23, 1971 to the office of Alderman of the 34th Ward of the City of Chicago and that the proper official of the City of Chicago be directed to certify the name of the plaintiff as the duly elected Alderman of the 34th Ward of the City of Chicago;

or, in the alternative, if it be impossible on the basis of the evidence available, to declare plaintiff the winner and the duly elected Alderman of the 34th Ward, then the Court declare and adjudge that the said election in the 34th Ward was so infected by fraud and unlawful conduct that a new election must be held, and that the Court thereupon order that a new election between plaintiff and the defendant Frost be conducted on an early, appropriate, and convenient date;

(e) that pending the hearing of this contest this Court make and enforce all necessary orders for the preservation and production of the ballots, affidavits, poll books,

tally papers, returns, registers, applications to vote, and other papers or evidence that may bear upon this contest in order that the same may be used upon the hearing of this contest and be preserved as required by law and that plaintiff may have such action and further relief as this Court deems meet;

(f) that in the event the Court finds that the allegations of paragraph 11 are true and correct, that the Court order a new election between plaintiff and the defendant Frost in the 34th Ward on some convenient date.

/s/ Augustus A. Savage
Plaintiff

State of Illinois)
) SS.
County of Cook)

Augustus A. Savage, being first duly sworn, on oath deposes and says that he is the plaintiff in the above and foregoing Complaint, that he has read the above and foregoing Complaint subcribed by him, that he knows the contents thereof and that the same is true of his own knowledge, in substance and in fact, except as to those matters alleged in the following paragraphs which are alleged on information and belief and which he believes to be true: Paragraphs 7, 8, 9, 10, 11, and 12.

/s/ Augustus A. Savage

Subscribed and sworn to
before me this 28th day of
February, 1971.
/s/ Mary Lewis
Notary Public

Donald Page Moore
Suite 3200
69 West Washington Street
Chicago, Illinois 60602
346-0900
Attorney for Plaintiff

EXHIBIT A

Precinct	Aldermanic Ballots Requested	Votes Tallied For: Savage	Frost	Spoiled Ballots	Ballots Unaccounted For
1	171	20	141	10	0
2	125	5	115	5	2
3	132	7	116	8	9
4	200	120	72	9	1
5	265	120	90	41	41
6	288	121	145	22	22
7	203	47	155	7*	7
8	224	130	94	8	8
9	299	154	42	45	58
10	329	175	50	(6 Spoiled (97 Write- (In	
11	121	30	85	3	3
12	295	121	95	2	77
13	228	168	53		7
14	256	3	243		10
15	193	149	39	5	
16	350	57	127		166
17	116	92	23	1	0
18	96	43	43	6	4
19	138	16	122	1	1
20	193	130	63		
21	142	52	88	2	
22	202	44	147	11	
23	246	140	46		60
24	186	138	44	3	1
25	132	36	95		1
26	123	33	84		
27	102	15	84		

* Missing Canvass Sheets

Precinct	Aldermanic Ballots Requested	Votes Tallied For: Savage	Frost	Spoiled Ballots	Ballots Unaccounted For
28	78	13	62		3
29	171	85	79		7
30	201	79	118	4	
31	No Canvass Sheet Available				
32	Tallies Missing	222	182		
33	144	54	81		9
34	179	52	120	8	1
35	158	63	88		7
36	157	41	108		
37	71	9	57	5	
38	86	12	70	4	1 Write-In
39	120	11	99	10	
40	85	11	72	2	
41	93	18	72		
42	109	43	66		
43	226	131	86	11	2
44	169	83	79	8	1
45	178	77	92	8	1
46	165	87	72		6
47	249	65	165	6	13
48	183	108	67		8
49	248	15	229		4
50	132	72	59		1
51	104	15	81	10	2
52	156	12	96	18	28
53	107	7	96	5	1
54	82	9	73		

Precinct	Aldermanic Ballots Requested	Votes Tallied For: Savage	Frost	Spoiled Ballots	Ballots Unaccounted For
55	194	105	80	9	
56	282	161	113		8
57	359	202	157		
58	279	212	78		19 Over
59	102	36	65	1	
60	123	15	105	3	
61	153	8	131		

APPENDIX H

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — COUNTY DIVISION

Augustus A. Savage, Plaintiff,
v.
Wilson Frost, et al., Defendants.
No. 71 C 0282

ORDER

This cause coming on to be heard on the complaint and answers of the several defendants, and it appearing that the defendant Frost has asserted that the complaint is not sufficient in law, and the Court having listened to the arguments of counsel and having given full consideration to those arguments, memoranda filed by counsel and the complaint and answers herein, finds:

1. The complaint herein is not sufficient in law within the meaning of Ill. Rev. Stats. (1969) Ch. 24, § 21-27.

2. The complaint herein should be dismissed in accordance with the foregoing statutory provision.

It is therefore ordered, adjudged and decreed that the complaint be, and it is hereby dismissed.

On the oral motion of plaintiff that they be required so to do, it is further ordered that pending final disposition of any appeal from the foregoing order the defendants Kusper, Suthers, and Canary, both individually and as together constituting the Chicago Board of Election Commissioners shall impound, keep, and preserve inviolate all of the ballots, voter applications, absentee ballots, affidavits, binders, poll books, certificates, tallies, lists, registers, reports, and other papers, books and records which were used in connection with the aldermanic election of February 23, 1971, in the 34th Ward or any of its precincts.

ENTER: .....
HARRY G. COMERFORD
Circuit Judge

March 24, 1971

SUPREME COURT, U. S.

23-

No. 1133

In The

Supreme Court of the United States

October Term, 1973

PHILIP W. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY T. KUPSTA, JR., PROMISE W. COURNEY, and MARIE H. GUTHRIE, Individually and as the members of the Board of Election Commissioners, and as members of the Board of ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY T. KUPSTA, JR., PROMISE W. COURNEY, and MARIE H. GUTHRIE, Individually and as the members of the Board of Election Commissioners, and as members of the Board of ELECTION COMMISSIONERS,

Respondents.

BRIEF OF BENNETT STEWART AND WILSON FROST, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1973

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY T. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY T. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

BRIEF OF BENNETT STEWART AND WILSON FROST, RESPONDENTS, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASES.

The February 23, 1971 Aldermanic Election in the City of Chicago was a regularly scheduled election for Alderman in each of the 50 Wards of the City of Chicago. The terms of the incumbents involved in this case will end in April, 1975. The next Aldermanic Election will be held in February, 1975. The Petitioners' Statement of the Cases should be examined in the light of the decision of the trial court and of the Illinois Appellate Court that what Petitioners refer to as fact was insufficient to warrant an election contest being allowed to proceed in the courts of Illinois. Further, we do not believe that the inferences drawn by the Petitioners from the Complaints (Pet.App. C & G) and stated as facts in their Statement of the Cases are warranted, even as advocacy.

REASONS FOR NOT GRANTING THE WRIT.

I.

THE QUESTIONS PETITIONERS SEEK TO PRESENT FOR REVIEW WERE NOT RAISED BELOW.

The "Questions Presented" in the Petition For A Writ of Certiorari in reality appear to suggest two basic questions:

1. Whether the state requirement of specificity of pleading invoked in this case violated the due process clause of the XIV Amendment to the Constitution of the United States; and

2. Whether the state statutory limitation of five days in which to specifically plead facts sufficient to show a right to maintain an election contest proceeding violates the due process clause of the XIV Amendment to the Constitution of the United States.

Neither the "Questions Presented" in the "Petition For A Writ Of Certiorari" nor the questions suggested as the basic questions raised by the Petition were raised in the proceedings below. The Petitioners, in their briefs before the Illinois Appellate Court, as an issue presented for review, state the question:

> In dismissing the complaint, did the court below violate plaintiff's rights under the XIV Amendment to the United States Constitution. . . . (Res.App. A1, B1)

The Appellate Court of Illinois, First District, in disposing of that question stated:

> Plaintiff next contends that the decision of the trial court violates his federal and state constitutional rights. He cites no authority nor could we find any, even suggesting that the statutory requirement is unconstitutional." *Savage* v. *Frost,* 14 Ill.App.3d 1036, 304 N.E.2d 1, 3 (1973); *Smith* v. *Stewart,* 14 Ill.App.3d 1039, 304 N.E.2d 3, 5 (1973).

It thus appears that the constitutional question, if it exists in this case, was not urged and briefed below. (Res. App. A1-9, B1-9). In that circumstance, this case may not properly be maintained in this Court, *Susie A. Tyrell, etc.* v. *District of Columbia,* 243 U.S. 1, 37 S.Ct. 361 (1971), absent some exceptional consideration. *Duignan* v. *United States,* 274 U.S. 195, 47 S.Ct. 566 (1927). No exceptional circumstances are offered for consideration by the Petition. We urge, on that basis alone, the denial of the Petition For A Writ Of Certiorari.

II.

THE STATE COURTS' DECISIONS IN THESE CASES ARE IN ACCORD WITH THE DECISIONS OF THIS COURT.

The Petitioners conclude the first point in the Reasons For Granting The Writ by stating "The issues are truly of major significance." They cite and quote from *Wesberry* v. *Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526 (1964) and *Williams* v. *Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968). No person cognizant of the Constitution of the United States and the development of the law in the area of personal rights in elections would take issue with the abstract statements of the law and quotations. However, those statements have no relationship to the failure of a candidate to plead substantially enough to warrant a court entertaining his complaint. The Petitioners assert that the

decisions of the Appellate Court of Illinois in these cases have determined that there is no remedy for vote fraud in Aldermanic Elections in Chicago. Nothing could be further from the truth. See: Ill.Rev.Stats., Ch. 46 §§29A-1, 29A-8. The County Prosecutor, the United States District Attorney and the election authorities have prosecuted persons for misconduct in elections since those decisions.

The trial court determined that these Petitioners did not plead sufficiently to warrant the court entertaining their cases and the Appellate Court of Illinois agreed. The Petitioners seem to rely primarily on their assertions that election irregularities are prevalent in Chicago. This assertion, while it may well have significant appeal for demagogic politicians, has not been demonstrated to be true, nor was the claim made below.

The federal court has considered the question of whether or not a five day time requirement in an Aldermanic Election is a denial of due process. The Court of Appeals for the 7th Circuit in *Briscoe* v. *Kusper,* 435 F.2d 1046, 1056 (1970) held, in a case involving the 1967 Aldermanic Election in Chicago, that a similar five day time limit for initiating action to secure a remedy did not contravene the due process requirements of the XIV Amendment to the Constitution of the United States.

This court in *Lindsey* v. *Normet,* 405 U.S. 56, 92 S.Ct. 862 (1972), in ruling on the constitutionality of a requirement of trial not later than six days after service of the complaint contained in the Oregon Forcible Entry and Wrongful Detainer Statute, rejected the assertion of the Plaintiff that the due process clause of the XIV Amendment was violated by that statutory requirement. This in a case where shelter, one of the basic requirements of

man, was threatened; if the Plaintiff was without funds with which to post the bond required by the Oregon statute while the case was pending, it appears that the detainor was dispossessed.

Thus, it appears that the Illinois Appellate Court in *Smith* v. *Stewart, supra, Savage* v. *Frost, supra,* the Court of Appeals for the 7th Circuit in *Briscoe* v. *Kusper, supra,* and this Court in *Lindsey* v. *Normet, supra,* have all ruled that a short period of limitation found in state statutes does not violate the due process clause of the XIV Amendment to the Constitution of the United States. No decision of or dicta from any court to the contrary is submitted by the Petitioners. The Petitioners' conclusion that "The issues are truly of major significance" fades into insignificance in the light of reasonable examination.

III.

PETITIONERS DID NOT RAISE, BRIEF OR ARGUE ANY DUE PROCESS CLAIM, PROCEDURAL OR SUBSTANTIVE, BELOW.

The reliance of the Petitioners on *Surowitz* v. *Hilton Hotels Corporation,* 383 U.S. 363, 86 S.Ct. 845 (1966), in Part 2 of their Brief is unwarranted. *Surowitz* presented a question of the proper construction of the then existing Rule 23(b) of the Federal Rules of Civil Procedure, a matter of construction wholly within the competence of the federal courts. The pleading requirements in this case are governed by Ch. 24, §21-27, Ill.Rev.Stats. and Ch. 46, §7-63, Ill.Rev.Stats., and the primary court to determine the proper construction of those statutes are the courts of Illinois. This Court on numerous occasions has required the federal courts to await construction of state statutes

before determining the federal constitutionality of the statute. *Reetz* v. *Bozanich*, 397 U.S. 82, 90 S.Ct. 788 (1970); *Lake Carriers Association* v. *MacMullan*, 406 U.S. 498, 92 S.Ct. 1749 (1972); *Clay* v. *Sun Insurance Office Limited*, 363 U.S. 207, 80 S.Ct. 1222 (1960). That construction has been made in this case but the Petitioners neither adequately briefed or argued any constitutional question below. (Res.App. A,B). We concede that the construction of the Illinois statute is not final on the question of the constitutionality of the statute, but the constitutionality of the statute involved in this case, Ch. 24, §21-27, Ill. Rev.Stats., has not been attacked by the Petitioners either in the trial court, in the Illinois Appellate Court or this Court.

The contention of the Petitioners that the dismissal of a complaint without the hearing of evidence is denial of a hearing is totally without merit. A Motion to Dismiss the complaint for failure to state a claim upon which relief may be granted is the usual method in the federal courts of testing the legal sufficiency of a complaint. The same role is played in the Illinois State courts by a motion to dismiss the complaint as substantially insufficient as a matter of law. *Wuellner* v. *Illinois Bell Telephone Co.*, 390 Ill. 126, 60 N.E.2d 867 (1945); *People for Use of Dyer* v. *Sawyer*, 284 Ill.App. 463, 2 N.E.2d 343 (1936); *Richards* v. *Leimbacher*, 267 N.E.2d 523, 525 (1971). It is obvious that the Petitioners' real complaint is that they were not allowed to present evidence on an insufficient complaint. They had a judicial hearing and an order was entered. (Pet.App. 15a, 36a). Petitioners neither cite nor allude to any authority supporting any right to present evidence on an insufficient complaint. The Petitioners here, as they did in the Appellate Court of Illinois, have furnished no authority for the novel position they urge.

IV.

THERE ARE NO PRINCIPLES INVOLVED IN THIS CASE WARRANTING THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The statements of the Petitioners in part three of their Reasons for Granting A Writ of Certiorari impugn the integrity of every plaintiff and suggests subornation of perjury by every lawyer who represents a plaintiff in an election contest proceeding in Illinois. As in their brief before the Illinois Appellate Court, they state no authority to support the extravagant position which they urge. The Supreme Court of Illinois has considered the requirements of pleadings in election contest cases and approved pleading on information and belief in *Smiley* v. *Lenane,* 363 Ill. 66, 1 N.E.2d 213, 216 (1936). The Illinois Appellate Court in both *Savage* v. *Frost, supra,* at page 2, and *Smith* v. *Stewart, supra,* at page 4, relied on a prior decision of the Illinois Supreme Court, *Zahray* v. *Emricson,* 25 Ill.2d 121, 124, 182 N.E.2d 756, 758 (1962), and quoted and stated:

> "Equally certain is the principle that the proceedings cannot be employed to allow a party, on mere suspicion to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge." In following this principle the courts are obliged to insure carefully that all the statutory procedures are fulfilled when an election contest complaint is filed.

We respectfully suggest that particularly apt in considering this case is the statement of this Court in *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 619 (1955), that:

> . . . it is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . . .

This case is one where two defeated political candidates seek to gain a right to examine ballots apparently to find out if there is any basis on which they can overturn the will of the people in a proper election. It involves no principle which is of importance to the people.

The Petitioners have not brought themselves within the considerations governing review by a Writ of Certiorari as set out in Rule 19 of the rules of this Court.

We respectfully suggest that for all of the foregoing reasons the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

No. 56746

IN THE

[redacted] Court of Illinois

PHILLIP G. SMITH,

Plaintiff-Appellant,

vs.

BENNETT M. STEWART, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.
Circuit Court No. 71 Co. 283.

Honorable Harry G. Comerford, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

DONALD PAGE MOORE
POPE, BALLARD, KENNEDY, SHEPARD & FOWLE
69 West Washington Street
Chicago, Illinois 60602
Telephone: 346-0900
Attorney for Plaintiff-Appellant

Oral Argument Requested

IN THE

Supreme Court of Illinois

PHILLIP G. SMITH,

Plaintiff-Appellant,

vs.

BENNETT M. STEWART, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.
Circuit Court No. 71 Co. 283.

Honorable **Harry G. Comerford**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

Plaintiff's election contest complaint was dismissed by the court below for failure to state a cause of action under the relevant statute, Ch. 24, ¶21-27, Ill.Rev.Stat. 1969. Plaintiff appeals the order of dismissal. The issues presented are raised by the pleadings.

ISSUES PRESENTED FOR REVIEW

(1) In dismissing the complaint, did the court below violate plaintiff's rights under the 14th Amendment to the

United States Constitution or the due process and "free and equal elections" provisions of the Illinois Constitution?

(2) Did the complaint state a cause of action under Ch. 24, §21-27, Ill.Rev.Stat. 1969?

JURISDICTION

This direct appeal from the Circuit Court of Cook County invokes this Court's jurisdiction under §302(a)(2) of this Court's rules because it involves a question arising under the federal and Illinois constitutions. The direct appeal is proper, *see, e.g., Thompson* v. *Conti,* 39 Ill.2d 160, 165 (1968); *Craig* v. *Peterson,* 39 Ill.2d 191 (1968).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 24, §21-27, Ill.Rev.Stat. 1969:

> (Election contest—Petition.) Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from such ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within 5 days after such election with the Clerk of the Circuit Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the election, within such 5 days, informing them that such complaint has been or will be filed. The judge of the Circuit Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such con-

test after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election in such city. In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of the court that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-26. As amended by act approved Aug. 24, 1965. L.1965, p. 3375.

14th Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, §2, Illinois Constitution of 1870:

No person shall be deprived of life, liberty or property, without due process of law.

Art. I, §2, Illinois Constitution of 1970:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Art. II, §18, Illinois Constitution of 1870 and Art. III, §3, Illinois Constitution of 1970:

All elections shall be free and equal.

POINTS AND AUTHORITIES

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Gray v. *Sanders*, 372 U.S. 368 (1963).

United States v. *Classic*, 313 U.S. 299 (1941).

Boddie v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113 (1971).

Craig v. *Peterson*, 39 Ill.2d 191 (1968).

Lehman v. *Hill*, 414 Ill. 173 (1953).

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

Whitzell v. *Rutherford*, 118 Ill.App.2d 401 (5th Dist. 1969). [No citations since decided.]

Easdale v. *Sparta Community School District*, 29 Ill.2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928).

Zahray v. *Emricson*, 25 Ill.2d 121 (1962).

Ch. 24, §21-27, Ill.Rev.Stat. 1969.

STATEMENT OF FACTS

The complaint was dismissed for failure to state a cause of action. Therefore, this statement of facts treats the factual allegations of the complaint as being true.

On February 23, 1971, the City of Chicago conducted an election for the office of Alderman of the 21st Ward. (R. C3.) Plaintiff Smith won that election by more than 800 votes. (R. C7.) However, because of a series of deliberate miscounts and other frauds (see R. C-7-15) the official canvass recorded, and the statutory election board proclaimed, that defendant Stewart had won by 518 votes out of 9,936 votes cast. (R. C3.)

Plaintiff then commenced this action by filing his verified election contest complaint within the five-day statute of limitations imposed by Ch. 24, §21-27, Ill.Rev.Stat. 1969. The complaint prayed that a recount of the ballots (this was a paper ballot election, rather than one conducted by use of voting machines, see R. C3) be conducted. (R. C11-12.)

In support of its allegation that the plaintiff had been defrauded of his victory, the complaint "by way of example only" (R. C8, ¶9) detailed a series of specific wrongs which had been committed by the judges of election in the 21st Ward on election day. (R. C8-10, ¶9.)

The following table sets out some of the specific wrongs alleged in the complaint. It shows the votes actually cast for each candidate in five precincts. It contrasts these "actual" totals with the "canvass" totals, *i.e.*, the totals fraudulently reported to, and proclaimed by, the Circuit Court in the official canvass. (The numbers in the table are taken from the respective allegations of paragraph 9 of the complaint. R. C8-10.)

	VOTES FOR PLAINTIFF		VOTES FOR STEWART	
Precinct	Actual	Canvass	Actual	Canvass
21	129	63	63	129
53	93	74	74	93
42			42	100
59			85	94
70	110	55	55	110

In addition to the miscounts set forth in the table, the complaint specifies miscounts aggregating 58 votes in two additional precincts (R. C8-9, ¶¶9(a) and (f)), and alleges that in at least two other precincts Plaintiff's watchers were illegally precluded from observing the count. (R. C10, ¶9(i).) The complaint alleges over 400 miscounted votes in addition to those specified above. (R. C9-10, ¶ 9(h).)

Defendants filed answers to the complaint, denying Plaintiff's key factual allegations and adding a contention that Plaintiff's complaint was insufficient in any event. (R. C19-21, 24-27.) The trial court dismissed the complaint as insufficient on its face. (R. C38.)

ARGUMENT

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

> "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."
>
> *Moore* v. *Ogilvie*, 394 U.S. 814, 818 (1969).

In effect, the court below held that despite the fact that plaintiff received a majority of the votes cast in the 21st Ward, it was proper and permissible for the defendant Stewart to be sworn in as the duly elected alderman of the 21st Ward. This characterization of the holding below follows ineluctably from the circumstances that:

(1) The complaint clearly sets forth the factual allegation that plaintiff received a majority of the ballots cast. (R. C6-7, ¶7; R. C10, ¶9-2.)

(2) For present purposes the factual allegations of the complaint must be taken as true, because the court below dismissed the complaint on motion, without taking any evidence.

Thus, the court below has sanctioned the wrongful installation of an important elected official who received a minority of the ballots cast while denying all relief to the candidate who was in fact elected by a majority vote.

No more basic violation of the constitutional right of the candidate and his constituents to have their votes "correctly counted and reported . . . [and] protected from the diluting effect of illegal ballots," *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), can be imagined.*

The conduct by the judges of election which is related in the complaint unquestionably violated plaintiff's federal constitutional rights. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299 (1941). It also violated the due process and "free and equal elections" provisions of the Illinois Constitutions of 1870 (Art. II, §§ 2 and 18) and 1970 (Art. I, §2 and Art. III, § 3):

> "When the ballot-box becomes the receptacle of fraudulent votes the freedom and equality of elections are destroyed. That election is free and equal where all of the qualified electors in the precinct are carefully distinguished from the unqualified and are protected in the right to deposit their ballots in safety and unprejudiced by fraud."
>
> *Lehman* v. *Hill*, 414 Ill. 173, 178 (1953) quoting from *Emery* v. *Hennessy*, 331 Ill. 296 (1928).
>
> "Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot."
>
> *Craig* v. *Peterson*, 39 Ill. 2d 191, 195 (1968) quoting *Moran* v. *Bowley*, 347 Ill. 148, 162-3 (1932).

Since the official conduct set forth in the complaint is unconstitutional, the State is constitutionally compelled to afford plaintiff "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113, 118

---

* Plaintiff is a qualified voter who voted in the 21st Ward election here involved, see R. C3-4, ¶2.

(1971). But the only meaningful and effective "opportunity to be heard" which Illinois affords to the victims of the constitutional wrongs involved in this case is the remedy which the court below has refused—an election contest under Ill.Rev.Stat. Ch. 24, §21-27. The enormity of this result is magnified by the circumstance that the wrongdoing officials involved were, by statute, the agents of the very court which has now refused all remedy for their misconduct. Ill. Rev. Stat. Ch. 46, §§ 6-21, 14-5.

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

The requirements for a proper election contest complaint have been concisely summarized in the most recent reported Illinois opinion to consider the subject:

> ". . . [T]he petition must allege: that a mistake or fraud was committed; that some irregularities occurred in the conduct of the election; and that the results of the election were changed by the fraud or irregularities. . . . Our examination of the pleadings reveals that these requirements were . . . met by the petitioner. While the specific irregularities are not set out in the petition, this is not necessary and general allegations are sufficient. *Joyce* v. *Blankenship*, 399 Ill. 136, 77 NE2d 325 (1948)."
>
> *Whitsell* v. *Rutherford*, 118 Ill.App.2d 401, 405 (5th Dist. 1969) (Eberspacher, Moran, and Goldenhersh, JJ.)

The present complaint clearly meets the above criteria. *Accord, Easdale* v. *Sparta Community School District*, 29 Ill. 2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928) is squarely in point on the decisive issue here. The recount petition which this Court sustained in that case was, in its key allegations, verified on the petitioners' information and belief (333 Ill. at 63) and was in all relevant respects comparable to the allegations in the present complaint. (See the Court's careful summary of the complaint, 333 Ill. at 63-71.) Note that the petitioners in *McGuidwin*, like the plaintiff here, were forced to estimate the numbers of miscounted or uncounted votes. (333 Ill. at 65-67).*

In appraising the applicability of the above cases to the present controversy, it is important to note that the present complaint deals with a reasonably close election, that it sets forth numerous specific examples of outrageous fraud and vote stealing with great particulity, and that it clearly alleges that a recount would change the result. Given the rule that "the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions," *Zahray* v. *Emrieson*, 25 Ill. 2d 121, 124 (1962), it is clear that the complaint is sufficient to warrant a recount, because its allegations, if true, constitute the required "adequate and well-defined cause" for setting aside the results of the election. *Ibid.* See *Easdale* v. *Sparta Community School District*, 29 Ill.2d 554, 557-58 (1963).

---

*Defendants have attacked the complaint because it "estimates" what the results of a recount will be. However, it is hard to understand how a truthful and honest plaintiff could ever do more than estimate the result of a recount which has not yet taken place.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court dismissing plaintiff's complaint should be reversed and the cause remanded with instructions to conduct the recount, hold a hearing on the factual issues raised by the pleadings and grant the other relief prayed by the complaint if the evidence so warrants.

Respectfully submitted,

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APPENDIX B

No. 56750

IN THE

APP [redacted] Court of Illinois

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

Circuit Court No. 71 Co. 282.

Honorable Harry G. Comerford, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

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Attorney for Plaintiff-Appellant

Oral Argument Requested

IN THE

Supreme Court of Illinois

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

Circuit Court No. 71 Co. 282.

Honorable **Harry G. Comerford,** Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT

NATURE OF THE CASE

Plaintiff's election contest complaint was dismissed by the court below for failure to state a cause of action under the relevant statute, Ch. 24, ¶21-27, Ill.Rev.Stat. 1969. Plaintiff appeals the order of dismissal. The issues presented are raised by the pleadings.

ISSUES PRESENTED FOR REVIEW

(1) In dismissing the complaint, did the court below violate plaintiff's rights under the 14th Amendment to the

United States Constitution or the due process and "free and equal elections" provisions of the Illinois Constitution?

(2) Did the complaint state a cause of action under Ch. 24, §21-27, Ill.Rev.Stat. 1969?

JURISDICTION

This direct appeal from the Circuit Court of Cook County invokes this Court's jurisdiction under §302(a)(2) of this Court's rules because it involves a question arising under the federal and Illinois constitutions. The direct appeal is proper, *see, e.g., Thompson* v. *Conti,* 39 Ill.2d 160, 165 (1968); *Craig* v. *Peterson,* 39 Ill.2d 191 (1968).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Ch. 24, §21-27, Ill.Rev.Stat. 1969:

> (Election contest—Petition.) Any candidate whose name appears on the ballots used in any ward of the city at any election for alderman, may contest the election of the candidate who appears to be elected from such ward on the face of the returns, or may contest the right of the candidates who appear to have received the highest and second highest number of votes to places on the official ballot at any supplementary election, by filing within 5 days after such election with the Clerk of the Circuit Court of Cook County, a complaint in writing, verified by the candidate making the contest, setting forth the grounds of the contest. The contestant in each contest shall also serve notice on all persons who were candidates for alderman of such ward at the election, within such 5 days, informing them that such complaint has been or will be filed. The judge of the Circuit Court of Cook County shall have jurisdiction to hear and determine such contest. All proceedings in relation to such con-

test after the filing of such complaint shall be the same, as near as may be, as provided for in the case of a contest at a primary election in such city. In case the court shall decide that the complaint is insufficient in law, or that the candidate who appears to have been elected on the face of the return has been duly elected, the complaint shall be dismissed. If it shall appear to the satisfaction of the court that the face of the returns are not correct, and that the candidate who appears thereby to have been elected was not in fact elected, then the candidates having the highest and second highest number of votes as determined by such contest shall be candidates at the subsequent supplementary election as provided for in section 21-26. As amended by act approved Aug. 24, 1965. L.1965, p. 3375.

14th Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. II, §2, Illinois Constitution of 1870:

No person shall be deprived of life, liberty or property, without due process of law.

Art. I, §2, Illinois Constitution of 1970:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Art. II, §18, Illinois Constitution of 1870 and Art. III, §3, Illinois Constitution of 1970:

All elections shall be free and equal.

POINTS AND AUTHORITIES

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

Gray v. *Sanders*, 372 U.S. 368 (1963).

United States v. *Classic*, 313 U.S. 299 (1941).

Boddie v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113 (1971).

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II.

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Easdale v. *Sparta Community School District*, 29 Ill.2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928).

Zahray v. *Emricson*, 25 Ill.2d 121 (1962).

Ch. 24, §21-27 Ill.Rev.Stat. 1969.

STATEMENT OF FACTS

The complaint was dismissed for failure to state a cause of action. Therefore, this statement of facts treats the factual allegations of the complaint as being true.

On February 23, 1971, the City of Chicago conducted an election for the office of Alderman of the 34th Ward. (R. C3.) Plaintiff Savage won that election by more than 600 votes. (R. C7.) However, because of a series of deliberate miscounts and other frauds (see R. C7-15) the official canvass recorded, and the statutory election board proclaimed, that defendant Frost had won by about 1400 votes out of some 10,000 votes cast. (R. C3.)

Plaintiff then commenced this action by filing his verified election contest complaint within the five-day statute of limitations imposed by Ch. 24, §21-27 Ill.Rev.Stat. 1969. The complaint prayed that a recount of the ballots (this was a paper ballot election, rather than one conducted by use of voting machines, see R. C3) be conducted. (R. C16-17.)

In support of its allegation that the plaintiff had been defrauded of his victory, the complaint "by way of example only" (R. C9, ¶9) detailed a series of specific wrongs which had been committed by the judges of election in the 34th Ward on election day.

The complaint charged that in 16 specified precincts, plaintiff's "duly qualified and accredited watchers and challengers . . . were prevented by [the] judges from observing the count and tally of the ballots." (R. C9-10, ¶¶9(b) and (c).)

The complaint charged that in the 14th Precinct, after the polls closed, plaintiff's watchers were illegally expelled from the polling place prior to the count. Then the judges "counted" 243 votes for defendant Frost and only 3 votes for plaintiff. The complaint then states that "Representatives of plaintiff have already obtained at least 115 affidavits from registered voters who voted in the 14th precinct and who have sworn under oath that they voted for plaintiff in the election." (R. C11-12, ¶9(i).)

A long series of specific allegations of vote stealing in particular precincts was included in the complaint.* The following table shows with respect to each of 16 precincts in the ward the number of votes *actually* cast for each candidate. It contrasts these "actual" totals with the "canvass" totals, *i.e.*, the totals fraudulently reported to, and proclaimed by, the Circuit Court in the official canvass. (The numbers in the table are taken from the respective allegations of paragraph 9 of the complaint, R. C9-15.)

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* The complaint set forth two additional instances in which plaintiff had obtained affidavits from his voters in a number which far exceeded the number of votes credited to plaintiff on the official canvass. (See R. C12, ¶9(k); R. C14, ¶9(r).) Given the five-day limitations period imposed by the statute, plaintiff's accumulation of affidavits from so many individual voters represents an extraordinary demonstration of the non-frivolity of his request for a recount.

Precinct	VOTES FOR PLAINTIFF		VOTES FOR FROST	
	Actual	Canvass	Actual	Canvass
5	155	120		
6	170	121	100	145
7	155	47	40	155
9	212	154		
10	272	175		
12	198	121		
14	223	3	23	243
16	223	57		
19	122	16	16	122
21	88	52	52	88
22	147	44	44	147
23	200	140		
32	252	222	150	182
34	120	52	52	120
49	229	15	15	229
52	58	12		

Defendants answered, denying plaintiff's key factual allegations and adding a contention that plaintiff's complaint was insufficient in any event. (R. C28-31, 34-37.) The trial court dismissed the complaint as insufficient on its face. (R. C50.)

ARGUMENT

I.

THE DECISION BELOW VIOLATES PLAINTIFF'S RIGHTS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS.

> "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."
>
> *Moore* v. *Ogilvie*, 394 U.S. 814, 818 (1969).

In effect, the court below held that despite the fact that plaintiff received a majority of the votes cast in the 34th Ward, it was proper and permissible for the defendant Frost to be sworn in as the duly elected alderman of the 34th Ward. This characterization of the holding below follows ineluctably from the circumstances that:

(1) The complaint clearly sets forth the factual allegation that plaintiff received a majority of the ballots cast. (R. C7, ¶7; R. C16, ¶ 12.)

(2) For present purposes the factual allegations of the complaint must be taken as true, because the court below dismissed the complaint on motion, without taking any evidence.

Thus, the court below has sanctioned the wrongful installation of an important elected official who received a minority of the ballots cast while denying all relief to the candidate who was in fact elected by a majority vote.

No more basic violation of the constitutional right of the candidate and his constituents to have their votes "correctly counted and reported . . . [and] protected from the diluting effect of illegal ballots," *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963), can be imagined.*

The conduct by the judges of election which is related in the complaint unquestionably violated plaintiff's federal constitutional rights. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299 (1941). It also violated the due process and "free and equal elections" provisions of the Illinois Constitutions of 1870 (Art. II, §§ 2 and 18) and 1970 (Art. I, §2 and Art. III, § 3):

> "When the ballot-box becomes the receptacle of fraudulent votes the freedom and equality of elections are destroyed. That election is free and equal where all of the qualified electors in the precinct are carefully distinguished from the unqualified and are protected in the right to deposit their ballots in safety and unprejudiced by fraud."
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Since the official conduct set forth in the complaint is unconstitutional, the State is constitutionally compelled to afford plaintiff "a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, ... U.S. ....., 28 L.Ed.2d 113, 118

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* Plaintiff is a qualified voter who voted in the 34th Ward election here involved, see R. C3-4, ¶2.

(1971). But the only meaningful and effective "opportunity to be heard" which Illinois affords to the victims of the constitutional wrongs involved in this case is the remedy which the court below has refused--an election contest under Ill.Rev.Stat. Ch. 24, §21-27. The enormity of this result is magnified by the circumstance that the wrongdoing officials involved were, by statute, the agents of the very court which has now refused all remedy for their misconduct. Ill. Rev. Stat. Ch. 46, §§ 6-21, 14-5.

II.

THE COMPLAINT PROPERLY PLEADED A CAUSE OF ACTION UNDER SECTION 21-27.

The requirements for a proper election contest complaint have been concisely summarized in the most recent reported Illinois opinion to consider the subject:

> ". . . [T]he petition must allege: that a mistake or fraud was committed; that some irregularities occurred in the conduct of the election; and that the results of the election were changed by the fraud or irregularities. . . . Our examination of the pleadings reveals that these requirements were . . . met by the petitioner. While the specific irregularities are not set out in the petition, this is not necessary and general allegations are sufficient. *Joyce* v. *Blankenship,* 399 Ill. 136, 77 NE2d 325 (1948)."
>
> *Whitsell* v. *Rutherford,* 118 Ill.App.2d 401, 405 (5th Dist. 1969) (Eberspacher, Moran, and Goldenhersh, JJ.)

The present complaint clearly meets the above criteria. *Accord, Easdale* v. *Sparta Community School District,* 29 Ill. 2d 554 (1963).

MacGuidwin v. *South Park Commissioners*, 333 Ill. 58 (1928) is squarely in point on the decisive issue here. The recount petition which this Court sustained in that case was, in its key allegations, verified on the petitioners' information and belief (333 Ill. at 63) and was in all relevant respects comparable to the allegations in the present complaint. (See the Court's careful summary of the complaint, 333 Ill. at 63-71.) Note that the petitioners in *McGuidwin*, like the plaintiff here, were forced to estimate the numbers of miscounted or uncounted votes. (333 Ill. at 65-67).*

In appraising the applicability of the above cases to the present controversy, it is important to note that the present complaint deals with a reasonably close election, that it sets forth numerous specific examples of outrageous fraud and vote stealing with great particulity, and that it clearly alleges that a recount would change the result. Given the rule that "the pleadings in contest proceedings are not required to comply with the strict technical rules applicable in civil actions," *Zahray* v. *Emricson*, 25 Ill. 2d 121, 124 (1962), it is clear that the complaint is sufficient to warrant a recount, because its allegations, if true, constitute the required "adequate and well-defined cause" for setting aside the results of the election. *Ibid.* See *Easdale* v. *Sparta Community School District*, 29 Ill.2d 554, 557-58 (1963).

---

* Defendants have attacked the complaint because it "estimates" what the results of a recount will be. (R. C44.) However, it is hard to understand how a truthful and honest plaintiff could ever do more than estimate the result of a recount which has not yet taken place.

No. 73-1092

AUG 27

MICHAEL RODAK, JR.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

Petitioner,

vs.

WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(Petitioners' Petitions for Appeal as a Matter of Right or, In the Alternative, for Leave to Appeal, filed in the Supreme Court of Illinois) 3a-6a

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(Plaintiff's Memorandum in Opposition to the Motion to Dismiss the Complaint, filed in the Circuit Court of Cook County) 10a-11a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1632

PHILIP G. SMITH,

Petitioner,

vs.

BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

AUGUSTUS A. SAVAGE,

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vs.

WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY, and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Brief in Opposition of Respondents Stewart and Frost seeks to make two inter-related points: *first*, that

Petitioners, in attacking the statutory five-day limit for filing an election-contest suit, are assaulting a provision which the courts have repeatedly upheld; *second,* that the constitutional issues were not raised and passed on below.

In both particulars, Respondents are either mistaken or confused, or both. Petitioner's claim that their constitutional rights were violated does not include an attack on the constitutionality of the five-day limit for initiating court action. The constitutional issues were clearly raised and passed on below.

ARGUMENT

I. RESPONDENTS MISSTATE THE QUESTION PRESENTED.

Respondents' principal error is in misreading the "Questions Presented" section of the Petition (Pet., pp. 2-3). Contrary to Respondents' assertions, Petitioners' "Questions" do not involve an attack on the statutory requirement that the Court contest be filed within five days after the election. Thus the second "basic question" set out in Respondents' Brief, at page 3, is simply inaccurate. Petitioners are not raising any such question.

By contending that the Petition poses a question which in fact it does not, Respondents are able—with total irrelevance—to make much of the circumstance that the issue was not raised and briefed below. In fact, they devote most of their Brief to demolishing that straw man.

It is obvious that the Petition presents significant constitutional issues. At the heart of the matter are the due process implications of an absurdly strict requirement of pleading specific facts on the basis of personal knowledge rather than information and belief. That virtually impossible degree of pleading specificity—which the Illinois Appellate Court imposed in the guise of interpreting the statute—is highlighted by the circumstance that the initial pleading must be filed within five days of the election. In that respect the five-day limitation period is significant.

It is one thing, as a general rule of pleading, to require that a complaint be specific and that certain essentials be verified on the pleader's personal knowledge. Cf. Rule 23.1, Federal Rules of Civil Procedure. It is quite another thing to require that such a pleading be

filed within five days of the events out of which the claim arises. In the one instance, while imposing a burden on the pleader, the requirement does not confront him with an impossibility; he has the normal statutory limitations period in which to make an investigation and draft a complaint.

But to impose such a requirement and to insist that it be met within five days of the operative events is something else again. One can do only so much in five days, particularly when most of the evidence is to be found in documents—especially the ballots—which are not accessible to the pleader.

Pleading requirements do have constitutional implications. The right of a person to have his day in court can be rendered illusory simply by requiring that his pleadings measure up to an unrealistic standard of detail and precision, or, given the nature of "facts" and one's ability to learn them, by insisting that he verify only on the basis of personal knowledge. Cf. *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966).

II. THE CONSTITUTIONAL ISSUES WERE PRESENTED AND ADDRESSED BELOW.

At page 7 of their Brief, Respondents make the following incredible statement. "The Constitutionality of the statute involved in this case, Ch. 24, §21-27, Ill. Rev. Stats., has not been attacked by the Petitioners either in the trial court, in the Illinois Appellate Court or this Court."

Petitioners challenge in this Court, as they did below, the interpretation of the statute in a fashion which deprives them of constitutional rights. And Petitioners have consistently, throughout this litigation, made such constitutional challenge.

In this Court, the "Questions Presented" section of the Petition clearly shows that Petitioners have con-

stitutional objections to the statute as interpreted by the highest court of Illinois which has passed upon it.

In the Illinois Appellate Court, the highest court to rule, Petitioners in their briefs urged that the decision of the trial court violated their rights under the Federal constitution. Among other things, they quoted from *Moore* v. *Ogilvie,* 394 U.S. 814, 818 (1969): "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote." Indeed, Respondents' own Appendices in their Reply Brief here, reproducing Petitioners' briefs filed in the Illinois Appellate Court, show conclusively that the constitutional issues were raised below. Moreover, Respondents themselves, notwithstanding their assertion in their Brief, included in *their* brief filed in the Illinois Appellate Court a section specifically entitled: "II. Plaintiff-Appellant Was Not Deprived Of Any Constituional Rights." (Appendix A)

Apart from the fact that the constitutional issues were addressed below by all parties to the litigation, it is sufficient that the court below reached and decided them for assuring conformity to the necessity of their having been considered. Cf. *Jenkins* v. *Georgia,* 42 U.S.L.W. 5055, 5056 (June 24, 1974); *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959).

The constitutional issues were again raised, in Petitioners' motion filed in the Illinois Supreme Court, when Petitioners there sought to appeal as a matter of right or, alternatively, for leave to appeal. (Appendix B). In that motion, petitioners separately raised the constitutional issues, and further incorporated therein the briefs which Respondent here has attached as Appendices A and B to their Reply Brief in this Court. And, as stated earlier, these Appendices conclusively show that the constitutional issues were raised below.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court dismissing plaintiff's complaint should be reversed and the cause remanded with instructions to conduct the recount, hold a hearing on the factual issues raised by the pleadings and grant the other relief prayed by the complaint if the evidence so warrants.

Respectfully submitted,

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Finally, in the trial court, on March 17, 1971, Petitioners' counsel—met with the contention that the statute (Sec. 21-27 of Chap. 24, Ill. Rev. Stat.) required that specific facts be verified as a matter of personal knowledge—in turn argued:

> . . . (I)f it is construed in that way . . . then, as construed and applied in this case, that statute (Section 21-27), not only on its face but as construed and applied, violates the due process, the equal protection, the privileges and immunities and the democratic form of government provisions in the Federal Constitution . . .
>
> To avoid that very serious constitutional question, this court should construe this statute so that it is fair. And the only way that this can be made a fair statute, given this very extreme requirement of a five-day limitation on the time in which the petitions can be filed, is to say that a candidate can allege things on information and belief . . . and that the candidate is free to be honest and to state as estimates things which are, in the nature of things, estimates . . . (Appendix C).

Two days later, Petitioners filed memoranda (Appendix D), paragraph 3 of which asserted:

> If the governing statutes were to be construed as to require dismissal of [the] Complaint for failure to state a claim upon which relief can be granted, then each of such statutes (specifically, Ch. 24, 21-27, and Ch. 46, §§ 7-63 and 23-20) is unconstitutional, both on its face and as construed and applied in this case, because it violates: (a) The due process, equal protection, and privileges and immunities clauses of the United States Constitution . . .

The constitutional issues were raised in the trial court and again in the Appellate Court. Both courts ruled on them. Petitioners are entitled to raise those issues here.

CONCLUSION

Respondents' Brief in Opposition begins with a misreading of the Petition and a distortion of the record. Thereafter it does no more than elaborate its own misconceptions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 56750

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

Honorable HARRY G. COMERFORD, *Judge Presiding.*

BRIEF OF DEFENDANTS-APPELLEES

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Oral Argument Requested

. . . precinct, the judges of election certify "that the above and foregoing" results are true and correct. These judges of election are officers of the Circuit Court of Cook County, and are sworn to the performance of their duties. Ill. Rev. Stats. (1969), Ch. 46, §14-5, 14-7. Certainly, a defeated candidate should not be allowed to overcome the certified and sworn actions of officers of the court and force a recount solely on the ground that he "estimates" that the official count and canvas are not correct. See *Mac Guidwin* v. *South Park Comrs.*, 333 Ill. at 71.

II.

PLAINTIFF-APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS.

Citation of abstract dicta notwithstanding, there is nothing in the record to indicate that the decision of the Circuit Court violated any federal or state constitutional rights of plaintiff-appellant. He was obligated to file a verified complaint "sufficient in law" in order to secure a recount. He failed so to do. Thus the Circuit Court of Cook County took the only action that it could take properly. As the statute directed, it dismissed the complaint.

Interestingly, Savage never sought leave to amend his "complaint" to correct the deficiencies which were brought to his attention. Even more significant, he cites no authority even suggesting that the statutory requirement is unconstitutional. Thus we have the anomalous situation of a defeated candidate who claims a constitutional right to a "fishing expedition," though he was unwilling to allege, under oath, that it would affect the officially proclaimed result of the election. We respectfully submit that there is no authority for any such contention.

APPENDIX B

IN THE
SUPREME COURT OF ILLINOIS

AUGUSTUS A. SAVAGE, *Petitioner.* vs. WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS, *Respondents.*	Petition for Leave to Appeal from the Appellate Court First District. There Heard on Appeal from the Circuit Court of Cook County, County Division. Honorable JOSEPH J. DRUCKER, *Judge Presiding.*

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

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IN THE

SUPREME COURT OF ILLINOIS

AUGUSTUS A. SAVAGE, *Plaintiff-Appellant-Petitioner,* v. WILSON FROST, *et al.*, *Defendants-Appellees-Respondents.*	Appeal From The Appellate Court Of Illinois, First District.

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

1. Plaintiff-Appellant appeals the judgment of the Appellate Court for the First District in this case. In the alternative, he petitions this Court for leave to appeal from that judgment.

2. The judgment of the Appellate Court was entered on October 12, 1973. No petition for rehearing was filed.

3. The points relied upon for reversal are:

(a) By denying a recount, the Appellate Court denied plaintiff all remedy and all meaningful opportunity to be heard on his charges that he was unconstitutionally defrauded of his election victory. It thus violated the due process and equal protection provisions of the Fourteenth Amendment and the due process and free and equal elections provisions of the Illinois Constitution of 1870 (Art. II, §§2, and 18) and 1970 (Art. I, §2 and Art. III, §3).

(b) As construed and applied by the Appellate Court, Ch. 24, §21-27, Ill. Rev. Stat. 1969 violates the above

constitutional provisions because it operates to deny plaintiff all remedy and all meaningful opportunity to be heard on his charges that he was unconstitutionally defrauded of his election victory.

(c) The Appellate Court erroneously concluded that the complaint failed to state a cause of action under the above statute.

4. The relevant facts, issues, and legal arguments are concisely presented in the attached brief which was filed in this Court by plaintiff-appellant when he attempted a direct appeal from the judgment of the trial court. Subsequently, this Court transferred the case to the Appeliate Court which, in due course, entered the judgment now sought to be reviewed.

5. For the reasons set forth at pages 8-10 of the attached brief, the constitutional issues are now ripe and were wrongly decided below. In addition, the construction of the election contest statute by the Court below flatly and unavoidably conflicts with the holding of the Appellate Court for the Fifth District in *Whitsell* v. *Rutherford,* 118 Ill. App. 2d 401, 405 (1969) (Eberspacher, Moran, and Goldenhersh, JJ.) See the discussion at pages 10-11 of the attached brief.

The Court below criticized the assertions in the complaint that plaintiff "estimated" the total number of votes which a recount would disclose that he had obtained. But that was merely honest pleading. *Of course* plaintiff could do no more than estimate the results of a recount which has not yet taken place: No honest plaintiff will ever be able to plead more than that.

The court below also relied on the form of the complaint's verification, pointing out that key allegations were

sworn to on "information and belief". Once again, this is simply an attack on honest pleading: *of course,* a candid and honest plaintiff must so qualify his allegations about ballots which he has never seen and cannot get access to.

The ultimate point is clear and simple: The decision below, for all practical purposes, has eliminated the recount as a viable procedure for ascertaining whether an election has been stolen by means of a false count in the polling place. It does this by requiring the plaintiff either to lie about his knowledge of the facts (thus avoiding the use of terms such as "estimate" and "information and belief") or, in the alternative, to see his complaint dismissed because he has failed to plead a cause of action.

Respectfully submitted,

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APPENDIX C

State of Illinois)
) ss
County of Cook)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DIVISION

AUGUSTUS A. SAVAGE, *Plaintiff;* v. WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting The Chicago Board of Election Commissioners, *Defendants.*	No. 71 Co. 0282

and

PHILIP G. SMITH, *Plaintiff;* v. BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting The Chicago Board of Election Commissioners, *Defendants.*	No. 71 Co. 0283

Transcript of Proceedings in the hearing of the above entitled cause before the Honorable Harry G. Comerford, one of the judges of said court, on Wednesday, the 17th day of March, A. D. 1971, at the hour of 10:30 o'clock A.M.

APPEARANCES:

MR. DONALD PAGE MOORE
and
MR. THOMAS N. TODD,
appeared on behalf of the plaintiffs;

MESSRS. MC COY, MING & BLACK,
by MR. WILLIAM R. MING, JR.
and
MR. ALDUS S. MITCHELL,
appeared on behalf of the defendants Wilson Frost and Bennett M. Stewart;

MESSRS. WASHINGTON, KENNON, BRYANT & HUNTER, by MR. HOWARD M. MILLER,
appeared on behalf of the defendants Stanley J. Kusper, Jr., Francis P. Canary, and Marie H. Suthers, individually and as together constituting The Chicago Board of Election Commissioners.

. . . that Mr. Ming urges for the reasons I have outlined there.

Secondly, if it is construed in that way, the way that Mr. Ming urges, then, as construed and applied in this case, that statute, not only on its face but as construed and applied, violates the due process, the equal protection, the privileges and immunities and the democratic form of government provisions in the Federal Constitution and their analogues in the provisions of the Illinois State Constitution. Because it is fundamentally unfair to say to a plaintiff that "you must comply with the requirements", as Mr. Ming has urged that the statute says.

To avoid that very serious constitutional question, this court should construe this statute so that it is fair. And the only way that this can be made a fair statute, given this very extreme requirement of a five-day limitation on the time in which the petitions can be filed, is to say that a candidate can allege this on information and belief, and that is a proper verification, and that the candidate is free to be honest and to state as estimates things which are, in the nature . . .

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT-COUNTY DIVISION

AUGUSTUS A. SAVAGE,
Plaintiff,
v.
WILSON FROST, et al.,
Defendants.
No. 71 Co. 282

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS THE COMPLAINT

Plaintiff adopts and reiterates the contentions and legal theories asserted by his attorneys during the oral argument in this case on March 17, 1971. This memorandum is presented merely as a supplement to that argument by plaintiff's attorney.

1. The clear, unqualified allegations of Paragraphs 7 and 8 of the Complaint fully meet the statutory requirements governing the pleading of an election contest case. *Whitsell* v. *Rutherford,* 118 Ill. App.2d 401, 405, 255 N.E. 2d 34, 36 (5th Dist. 1969); *Accord, Easdale* v. *Sparta Community School Dist.,* 29 Ill.2d 554, 194 N.E.2d 306 (1963); *Joyce* v. *Blankenship,* 399 Ill. 136, 77 N.E. 2d 325 (1948).

2. Verification of some of the facts on plaintiff's information and belief is authorized by law. *Dial* v. *Welker,* 332 Ill. 509, 163 N.E. 772 (1928).

3. If the governing statutes were to be so construed as to require dismissal of plaintiff's Complaint for failure to state a claim upon which relief can be granted, then each of such statutes (specifically, Ch. 24, §21-27, and Ch.

46, §§ 7-63 and 23-20) is unconstitutional, both on its face and as construed and applied in this case, because it violates:

(a) The due process, equal protection, and privileges and immunities clauses of the United States Constitution, and

(b) The provisions of Art. II, §§ 2, 18 and 19 of the Illinois Constitution of 1870, and

(c) The provisions of Art. II, §§ 2 and 12, and Art. III, §§ 3 and 4 of the Illinois Constitution of 1970.

Respectfully submitted,
/s/ Donald Page Moore
One of Plaintiff's Attorneys.

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PROOF OF SERVICE

I caused copies of the above memorandum to be served upon the following:

William R. Ming, Esq.
123 West Madison Street
Chicago, Illinois
Hon. Howard Miller
Chicago Board of Election
Commissioners
City Hall
Chicago, Illinois

by delivery to their respective offices on March 19, 1971.

/s/ Donald Page Moore
Donald Page Moore